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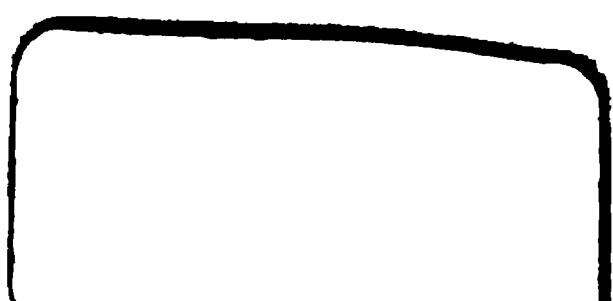
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INDIAN LAND LAWS

BEING A TREATISE ON

**THE LAW OF ACQUIRING TITLE TO, AND
THE ALIENATION OF, ALLOTTED
INDIAN LANDS.**

ALSO

**A COMPILATION OF TREATIES, AGREEMENTS
AND STATUTES APPLICABLE THERETO**

BY
S. T. BLEDSOE
OF THE OKLAHOMA BAR

1909
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PREFACE.

No more complicated and difficult questions are presented for the consideration of the legal profession of to-day than those arising out of the legislation prohibiting, limiting, or authorizing the alienation of allotted and inherited Indian lands. Title to more than one-half of the lands in the State of Oklahoma is dependent upon the proper construction of legislation of this character. The same is true to a greater or less degree with reference to every Western State.

The right to alienate rests upon various agreements and acts of Congress, widely scattered, fragmentary and contradictory. In addition thereto there is involved in many cases the laws of descent, dower, curtesy, mortgages, conveyances, etc.

It has been the purpose of the author to bring together, as a part of this treatise, those statutes and agreements which it is necessary to consider in determining these questions. The most important and complicated statutes have received careful consideration in the light of such judicial interpretation as they may have received. Comparatively few of these statutes, however, have received authoritative interpretation, and the construction given the same is therefore chiefly that of experience and individual judgment. The endeavor has been to give that interpretation most in keeping with the language of the statute, considered in the light of previous legislation, and which will best subserve the ends of justice. It is not expected that the construction given will, in every instance, be that finally adopted by the courts. Such a result would hardly be possible in considering such complicated and conflicting legislation.

If this treatise shall prove of material assistance to the courts and lawyers who are endeavoring to find a fair, reasonable and just solution of the many vexed questions presented for their consideration, the author will feel more than compensated for the time and labor expended in its preparation.

The index is the work of Mr. Clinton O. Bunn of the Ardmore Bar.

S. T. BLEDSOE.

Guthrie, Oklahoma, September 6, 1909.

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PART I.

CHAPTER I.

INDIAN LEGISLATION IN GENERAL.

Section 1. Scope and purpose of work.

The purpose of this work is to discuss the titles of the allottees of the lands of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, commonly known as the Five Civilized Tribes, as distinguished from the tribal title before allotment, and with particular reference to the time when the land may be alienated.

Following the treatment of the subjects affecting allottees of the five civilized tribes, a like course will be pursued with reference to the allottees of all other Indian tribes who have received allotments within what is now the State of Oklahoma.

In order to understand these titles it will be necessary to consider the tenure by which the various tribes have held their lands, the legislation of Congress, before and after allotment, including the various treaties or agreements between the United States and the tribes; and the provision for making the final rolls of membership preparatory to allotment, together with the method by which the title has been conveyed to such allottees, so as to vest in each of them in severalty an indefeasible title in fee.

It will also be necessary to consider the various provisions of the treaties or agreements imposing restrictions on the right of sale, and the Acts of Congress, extending or removing such restrictions, as well as the Acts of Congress making the final rolls of the tribes, as prepared by the Secretary of the Interior conclusive as to the quantum of blood and age of the allottees.

In addition thereto consideration will be given to the laws governing descent and distribution, homestead exemptions, dower, curtesy, mortgages and other subjects, as applicable at different times to the lands derived from the several Indian Tribes.

The Choctaws and Chickasaws have held their lands in common and the rights of the allottees of these tribes are secured under the provisions of the same treaties or agreements.

The other tribes have each made separate treaties or agreements from time to time, and the rights of the allottees thereof are secured in the manner provided in the treaties or agreements made by the United States with the tribe to which the allottee belongs. Special effort has been made to include in part Two all Federal legislation relating to the subjects discussed in so far as the allottees of the Five Civilized Tribes are concerned. The legislation applicable to the other Indian tribes in Oklahoma than the Five Civilized Tribes is very voluminous and is not included. The material parts of such legislation is, however, in connection with the discussion of the various subjects.

Section 2. Original Indian titles in comparison.

It is well before beginning the consideration of the principal subject to call attention to the distinction between the title by which the Five Civilized Tribes held their lands and the ordinary tribal title of tribal Indians.

The extent of the rights of the aborigines of America to the particular tracts of land occupied by them at the time of the discovery of America, and subsequent thereto, has been the cause of much controversy and litigation. The courts have usually spoken in the highest terms of the moral right of the various tribes to the lands occupied by them, and have generally declared that the Indian right of occupancy is as sacred as the governmental right to the fee. Eulogiums upon the Indian right of occupancy have not infrequently been followed by judgments in which it would be difficult to find even a trace of the principle declared in the opinion.

Considering the means by which the Government secured its right to the ultimate fee, perhaps reason may be found for failure to give greater force and efficacy to the Indian right of occupancy.

The tribal rights of ordinary tribal Indians to the lands which they occupy, as declared by the Supreme Court of the United States, is the right of occupancy with the authority of disposition to the United States only.

This right of occupancy is unquestionable and continues

until extinguished by voluntary cession to the Government of the United States. It was never assumed that the right of discovery destroyed the Indian's right of occupancy, or conferred upon the Government authority to secure this right, otherwise than by consent of the tribe or tribes exercising the right of occupancy. *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Holden v. Joy*, 17 Wall. 211, 21 L. Ed. 523; *Cherokee v. Georgia*, 5 Pet. 48, 8 L. Ed. 296; *Beacher v. Weatherby*, 95 U. S. 517, 24 L. Ed. 440; *Spalding v. Chandler*, 160 U. S. 394, 40 L. Ed. 469; *Leavenworth L. & G. R. R. Co. v. U. S.*, 92 U. S. 733, 23 L. Ed. 634; *Buttz v. Northern P. R. R. Co.*, 119 U. S. 66, 30 L. Ed. 334.

Section 3. Original Indian titles in comparison—Continued.

In contradistinction to the mere right of occupancy, it will be observed as the consideration of the various tribal titles progresses that each of the Five Civilized Tribes acquired the lands under consideration by treaties or agreements with the United States, in each instance followed by a patent executed in due form, granting to the tribes, for the members thereof, the lands described therein, to be held in fee simple, but upon condition subsequent, the grant usually being limited as follows:

"To Have and to Hold the Same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the same."

Each of the Five Civilized Tribes continued to exist as a Nation and to occupy the lands thus patented until subsequent agreements were entered into by which they were allotted to the members of the tribe. The Five Civilized Tribes, therefore, at the beginning of the process of allotment had secured from the United States the fee to the lands they occupied, and had merged the right of occupancy into the fee. This distinction between the ordinary tribal title as considered by the courts and the title by which the Five Civilized Tribes held their lands is material in the consideration of the authority of the United States and of the rights possessed by the members of the tribe prior to allotment, and the process necessary to invest each allottee with an unqualified fee to the lands selected by him in allotment.

Section 4. General statutes relating to Indians not applicable.

Not a little misapprehension has arisen among those who are not entirely familiar with the laws applicable to the landed rights of the Five Civilized Tribes, because of the supposition that the general laws relating to the allotment of land to members of Indian tribes and the issuance of patents therefor, apply. Congress has for many years dealt with the Five Civilized Tribes by special legislation not applicable to Indian tribes generally. It has also exempted the Five Civilized Tribes from legislation enacted with reference to other Indian tribes. Sometimes this has been done by express provision contained in the statute; at other times it has been done by the use of language which is so clearly inapplicable to the conditions existing among the Five Civilized Tribes as to render it morally certain that it was not intended that it should apply to such tribes.

While no fixed policy upon this subject has found expression in any statute, the rule has been so uniform that in order to consider a general law with reference to Indian tribes applicable to the Five Civilized Tribes, the language should be so clear and explicit as to settle beyond controversy that it was the intention of Congress that it should apply.

With reference to those provisions of the statutes relating to the government and protection of the Indian country the rule is different. These statutes have always been treated as applicable to the Five Civilized Tribes where not modified by provision of some statute or by necessary inference therefrom. This is evidenced by the fact that the non-citizen of the Indian Territory long protested in vain against the payment of tribal taxes, or the tax to the tribes for permission to do business or reside in the territory of the various tribes.

But in so far as the tribal title to the lands of the Five Civilized Tribes, the manner of allotting the same, the title secured by the allottee, the manner in which such title is passed and the right to alienate, are concerned, all are dependent upon laws enacted with special reference to one or more of these tribes, which have no general application to other tribal Indians. *Buster & Jones v. Wright*, 82 S. W. 855, 135 Fed. 947; *Maxey v. Wright*, 54 S. W. 807; *Weimer v. Zevelly*, 82 S. W. 941, 138 Fed. 1006; *Ex parte Carter*, 76 S. W. 102; *Forsythe v. United States*, 64 S. W. 548.

Section 5. Construction of statutes relating to Indian lands.

Much of the difficulty and uncertainty arising out of legislation affecting land titles among the Five Civilized Tribes, is due to the manner of construing legislation of this character. Too many courts disregard the language of the statute, the context, and the ordinary indicia of legislative intention, and adopt a strained construction in order to protect the allottee against possible injury or loss in his dealings with and disposition of his allotted and inherited lands.

The members of the Five Civilized Tribes are citizens of the United States. There is no reason why in construing statutes affecting their rights, the ordinary rules of construction should not be observed. If such rules are not observed, then every judge becomes a law unto himself. Congressional acts cease to have the force and effect that they have in all other jurisdictions in which the rights of persons or property are dealt with. Pursuing the ordinary course, and giving to the language of the statutes the same construction that would be given if they were applicable only to persons who are not members of any Indian tribe or Nation, many difficulties will be eliminated, and the entire subject very much simplified. There is neither reason nor authority for adopting one standard of construction when dealing with one class of citizens and another standard when dealing with another class.

CHAPTER II.

CHOCTAWS AND CHICKASAWS.

Section 6. Tribal title. Treaties of 1830, 1837 and 1855.

Prior to 1830 the Choctaws and Chickasaws occupied tracts of land east of the Mississippi under the original Indian title protected by certain treaties entered into with the United States. In order to induce their removal to a section of country west of the Mississippi, the United States on the 27th day of September, 1830, entered into a treaty with the Choctaws whereby it was agreed that the United States would "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants to inure to them while they shall exist as a Nation and live upon it." (7 U. S. Statutes at Large, 333.)

In 1837 the Choctaws and Chickasaws with the approval of the United States entered into an agreement, by the terms of which the Chickasaws were to have a district in the Choctaw Country, and the members of each tribe were to have the same interest in the lands of the other tribe as in that of their own. (11 U. S. Statutes at Large 57.) Pursuant to this agreement, what is known as the Chickasaw Nation was set apart as the Chickasaw district of the Choctaw Nation.

By the treaty of 1855 the United States declared that "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part therein shall ever be sold without the consent of both tribes; and the said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." (11 U. S. Statutes at Large, 611.)

It is a fair construction of this treaty to say that it passed a fee simple title to the lands previously described, to the Choctaw and Chickasaw Tribes defeasible, perhaps upon the happening of the contingency mentioned in the proviso. The happening

of this contingency has been rendered impossible by the allotment of the lands among the members of the tribe by and with the consent and approval of the United States.

Section 7. Tribal title; provision for Freedmen:

In 1861 the Choctaws and Chickasaws espoused the cause of the Confederacy, and the United States insisted that they thereby forfeited their rights under the treaties referred to. After the close of the War, however, in 1866, a new treaty was entered into reviving and confirming the grants made in the treaties of 1830 and 1855. (14 U. S. Statutes at Large 769.)

This treaty also contained provision for allotment in severalty of the lands granted. By Article 38 of the treaty the privilege of membership in the tribes was conferred upon such white persons as should intermarry with members of said tribes in accordance with tribal laws, or should be adopted by the legislative authority thereof. Laws were enacted by the tribes making effective this provision, and as a result thereof the intermarried citizen has equal rights with the Indian by blood in both Nations.

By Articles 3 and 4 an effort was made to provide an allotment of forty acres of land for those persons of African descent who had been slaves of the members of either of said tribes. The Choctaws ratified this provision in behalf of the Freedmen, but the Chickasaws refused to do so. The rights of the Freedmen continued to be a source of serious controversy, until the Act of June 28, 1898. Their status was not finally determined until after the Supplemental Agreement of July 1, 1902, and the decision of the Supreme Court of the United States construing the various treaty provisions. The effect of this decision was that Freedmen acquired no rights in and to the lands of the Choctaws and Chickasaws under the treaty of 1866. However, under the provision of the Atoka Agreement each Freedman was permitted to select, hold, and occupy, pending the adjudication of his rights in and to the lands of the Choctaws and Chickasaws, lands equal in value to forty acres of the average allottable lands of these tribes. *United States v. Choctaw Nation*, 193 U. S. 115.

Under the provisions of the Supplemental Agreement, these allotments were confirmed, and the Choctaws and Chickasaws were permitted to recover of the United States the value of the lands so allotted to Freedmen. The Supplemental Agreement, therefore, fixes the status of the Freedman and the amount of

land that he is entitled to select and hold. By this agreement he is placed upon substantially the same footing as the members of the Choctaw and Chickasaw tribes, except that he is limited to the selection of land equal in value to forty acres of the average allottable lands of these tribes. (32 Stat. 641). Particular reference is made to these intermarried citizens and Freedmen at this time because all of the lands allotted to both classes are now alienable without restrictions of any character.

Substantially nothing was done looking toward the allotment in severalty of the lands of the Choctaws and Chickasaws until the creation in 1893 of the Commission to the Five Civilized Tribes, known as the Dawes Commission, which in 1898 entered into an agreement with the Choctaws and Chickasaws commonly known as the Atoka Agreement (30 U. S. Statutes at Large, 495) by which provision was made for the allotment in severalty of the tribal lands of the Choctaws and Chickasaws.

Section 8. Tribal title, improvements and right of possession of individuals.

During the interim between 1866 and 1898 the two tribes maintained local governments patterned somewhat after that of the State governments, each having its own laws which were binding upon its citizens and upon citizens of the other tribes residing within its jurisdiction. Under the laws enacted by the legislative authorities of each nation every member of each tribe was given the right to reduce to possession and improve, hold and occupy any part of the public domain not previously appropriated and to acquire by purchase the improvements of any other member of either of the tribes so made upon the public domain. A certain amount of improvement was required to be made within a given time in order to confer upon the member the exclusive right to possess, use and dispose of the same. These improvements, as distinct from the lands upon which they were situated, were legally transferable to any other member of the tribe, could be devised and were inheritable. Ownership of improvements carried with it the right to possession and the income of the land.

The improvements thus constructed and the lands thus reduced to cultivation conferred upon the person owning such

improvements and in possession of such land, a preference right to take the same in allotment under both the Act of June 28, 1898, which will hereinafter be referred to as the Atoka Agreement, and the Act of July 1, 1902, hereinafter referred to as the Supplemental Agreement.

Section 9. Construction of treaties of 1830 and 1855.

Much controversy and litigation have resulted over the proper interpretation of the clause of the treaty of 1855, which declares that "the United States do hereby forever secure and guarantee the lands embraced within the said limits to the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole."

The members of the Choctaw and Chickasaw tribes of Indians were the owners of slaves, and subsequent to 1866 some of the members intermarried with their former slaves. These slaves and their descendants are usually described by the word "freedmen." Upon the urgent solicitation of the United States several of the tribes conceded certain landed property rights to the freedmen of such tribes. The interest of the freedman and the terms and conditions upon which he holds the same varies somewhat in the different nations.

A large number of these freedmen who possessed a small quantum of Indian blood made application for enrollment as members of the Choctaw and Chickasaw tribes of Indians by blood. They insist that being descendants of the members of the tribes who made the treaties of 1830 and 1855 that they are entitled to "an equal undivided interest in the whole lands" of the Choctaws and Chickasaws, notwithstanding they were slaves and have not been treated or recognized as members of the tribes. The contention of these freedmen that they were entitled to enrollment as members by blood of the Choctaw and Chickasaw tribes, was recently decided in the case of *Ligon et al. v. Johnson et al.*, by the Circuit Court of Appeals for the Eighth Circuit, 164 Federal 670, adversely to the contention of the freedmen. That court held that the lands and moneys of the Choctaws and Chickasaws are public lands and public moneys, and that their lands, are not, prior to allotment, the

subject of individual ownership. That being true and the claim of the freedmen being based upon the contention, that they were heirs or successors of the members of the tribes who took by the treaties referred to and therefore entitled to a share in the lands and moneys of the tribes, was denied.

The syllabus, which correctly states the action of the court, is as follows:

"The land granted by the United States to the Choctaw Nation March 23, 1842, 'in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it,' pursuant to the treaty of September 27, 1830 (7 Stat. 333), in which land the Chickasaw Nation obtained an interest in common with the Choctaws by a treaty between them made January 17, 1837 (11 Stat. 573), became public land of the two nations and not the property of their individual members, and the disposition of such lands as tribal property was within the domain of Congress, whose action in that regard by Act April 26, 1906, c. 1875, 34 Stat. 137 (U. S. Comp. St. Supp. 1907, p. 867), which provided for individual allotments, the disposition of unallotted lands, and the distribution of the proceeds between members of the tribes as shown by an enrollment to be completed and approved by March 4, 1907, is conclusive upon the courts, which have no power to revise such enrollment."

This case is now pending on appeal in the Supreme Court of the United States from the decision and judgment of the Circuit Court of Appeals.

CHAPTER III.

CITIZENSHIP.

Section 10. Citizenship, tribal; how determined prior to 1893.

The government of the United States deemed it necessary before beginning the allotment of the lands of the Five Civilized Tribes to make a correct roll of the members thereof. Prior to 1896 the right to membership in the Choctaw and Chickasaw tribes respectively was determined by the legislature of the tribe, by citizenship committees appointed by the Legislature, or by judgments of the courts of the Nation in which the applicant was seeking citizenship. In some instances the Indian Agent, acting under authority of the Secretary of the Interior, entertained appeals from the judgments of the tribal authorities. This right was seldom exercised, and it is a matter of grave doubt whether the Indian Agent had the right at any time to entertain such an appeal. *Ligon et al. v. Johnson et al.*, 164 Fed. 670.

Section 11. Dawes Commission authorized to make citizenship rolls.

The Dawes Commission reported that the methods adopted by the tribal authorities had resulted in the admission to citizenship of many persons not entitled thereto, and in the exclusion of many others who were entitled to the rights of citizenship.

Congress being unwilling to trust the tribal authorities further in deciding the valuable rights of citizenship in the tribes conferred upon the Dawes Commission jurisdiction to hear and determine applications for enrollment as members of either of these tribes. The Act conferring this jurisdiction provided that in making this roll, "due force and effect" should be given "to the rolls, usages and customs of each of said nations or tribes." (29 U. S. Statutes at Large, 321.)

This Act confirmed certain tribal rolls and, in addition thereto, provided for an appeal by the person or nation aggrieved by the decision of the Commission to the United States Court in the Indian Territory. And provided further that the judgment of said courts should be final.

Section 12. Citizenship; Act of June 7, 1897.

By the Act of June 7, 1897 (30 U. S. Statutes at Large), authority was conferred upon the Commission to the Five Civilized Tribes to investigate and report to Congress whether the Mississippi Choctaws were entitled to the rights of membership in the Choctaw tribe of Indians. Additional authority was conferred upon the Commission for a period of six months to investigate the citizenship rolls of the various tribes, and to strike from the rolls the names of such persons found thereon as were not confirmed by the Act of June 10, 1896. The procedure provided was, that if after investigation, the Commission should determine that a given person was not entitled to membership in the tribe, he was given ten days' notice and an opportunity to be heard. The manner of conducting the hearings however, gave but limited opportunity for ascertaining the real merits of the controversy. If after the Commission acted, either the nation or the citizenship claimant felt aggrieved by its action, an appeal would lie to the court from the judgment of the Commission in the same manner as appeals were permitted under the provisions of the Act of June 10, 1896.

Section 13. Citizenship; Act of June 28, 1898.

The Act of June 28, 1898, made further provision for the investigation of the rolls of membership of the tribes and for eliminating the names of such persons as had been placed "thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes." This act contained the further provision that the rolls so made, when approved by the Secretary of the Interior should be final and the persons whose names were found thereon with the descendants thereafter born to them with such persons as may intermarry in accordance with the tribal laws shall *alone* constitute the several tribes which they represent. The constitutionality of these acts conferring jurisdiction upon the Commission to determine membership in the tribe was submitted to the Supreme Court of the United States in the case of the *Cherokee Nation v. Stephens*, 174 U. S. 445, and their constitutionality sustained.

Kimberlin v. Commission to Five Civ. Tribes, 104 Fed. 654; *Dick v. Ross*, 6 Ind. Ter. App. 85; *Ligon et al. v. Johnson et al.*, 164 Fed. 670.

Section 14. Rights of the heirs of members who died between June 28, 1898 and September 25, 1902.

The Atoka Agreement fixed no time for closing the membership rolls of the tribes, and it is contended by a few persons, that, it may therefore be fairly assumed that it contemplated a division of the property among the then members of the tribes. The Supplemental Agreement hereinafter referred to, provided that no heir of any member who had died prior to the 25th day of September, 1902, should participate in the division of the lands and properties of the tribes. A large number of the members of the tribes died subsequent to June 28, 1898, and prior to September 25, 1902. The heirs of some of the parties who died between June 28, 1898, and September 25, 1902, are asserting their right to take an allotment in the name of their ancestor. They contend that it was not within the power of the government of the United States and of the Choctaw and Chickasaw tribes, even though acting together and by agreement, to deprive a member of the tribe living on June 28, 1898, of his pro rata share of the land, or to deprive his heirs of the right to inherit from him his particular part of the tribal estate. It is believed that this contention is not well founded, and that the tribes in making this agreement had the authority to act for and bind their members in fixing a time for the closing of the roll and in fixing a membership basis for a division of the tribal property. This question has never been decided by any court of last resort and so far as the knowledge of the writer goes has never been directly decided by a trial court. *Woodbury v. U. S.*, 170 Fed. 302; *Bonifer v. Smith*, 166 Fed. 846.

Section 15. Citizenship court; judgments admitting claimants to citizenship vacated.

An additional agreement, known as the Supplemental Agreement, entered into between the United States and the Choctaw and Chickasaw Nations, became effective September 25, 1902. Sections 27 to 36, inclusive, of this Supplemental Agreement, deal with the subject of citizenship. Section 31 recites that the Choctaws and Chickasaws are dissatisfied with the judgment of the Commission and with that of the courts on

appeal, and insist that each tribe is jointly interested in all of the lands of the tribes, and that the judgments establishing the citizenship of the various claimants are invalid, because service was had in each instance only upon the Governor of the Chickasaw Nation, when the claimant was seeking the right to citizenship in the Chickasaw Nation, and upon the Principal Chief of the Choctaw Nation, when the claimant was seeking the right to citizenship in the Choctaw Nation. A citizenship court created by this agreement was authorized to hear the contention of the Nations and if it should find the same well founded, to set aside these judgments, grant new trials and thereupon try the cases anew upon their merits. The citizenship court very promptly held all the judgments void, ordered a new trial and decided practically every case, where any question of fact whatever was involved against the claimants. The claimants to citizenship sought to prohibit the citizenship court from proceeding, but before they secured a hearing it had already entered its judgment and the United States Supreme Court decided without passing upon the merits of the controversy, that the application for a writ of prohibition therefore came too late. *Re Joins*, 191 U. S. 93.

Section 16. Constitutionality act creating citizenship court sustained.

The claimants to citizenship thereupon challenged the constitutionality of the act creating the citizenship court, insisting that the judgment of admission to citizenship vested in them certain rights, including a share of the lands and property of the tribes, which could not be divested in the manner provided by the Act creating the citizenship court. The question was directly involved in the case of *Wallace v. Adams* (143 Fed. 716, 204 U. S. S. C. 415), a suit for the recovery of possession of certain land brought by a regularly enrolled citizen against one of the members of the tribe stricken from the roll by the judgment of the citizenship court. The authority of Congress to confer upon the citizenship court jurisdiction to vacate these judgments and award new trials was directly and distinctly sustained. The result of the decision was the elimination from the tribal rolls of the names of the persons whose membership had been denied by the citizenship court.

Section 17. Authority of secretary to strike name from approved roll denied.

On the 4th day of March, 1906, the Secretary of the Interior on the advice of the Attorney-General struck from the approved rolls of the various tribes the names of several hundred persons. This action was taken upon the ground that the enrollment of such members was based upon an erroneous construction of the law and that notwithstanding the provision that the roll should be approved in sections and when so approved should be final, that he had jurisdiction, after such approval, to eliminate names from the roll upon the assumption that his action in approving the same was improperly taken. The authority of the Secretary of the Interior to thus strike names from the roll was involved in a mandamus suit instituted by John E. Goldsby against Garfield, Secretary, in the Supreme Court of the District of Columbia, to compel the restoration of his name to the membership rolls of the Choctaw Tribe. The contention of Goldsby was considered by the Supreme Court of the District of Columbia and by the Court of Appeals for the District of Columbia, and the Secretary was ordered to restore his name to the rolls. *Garfield, Secretary, v. United States of America ex rel. John E. Goldsby*, Washington Law Reporter, December 13, 1907, p. 782. The syllabus, which clearly expresses the results reached in the decision, is in the following language:

"When the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall unless power to that extent has also been conferred upon him.

"Prior to October, 1905, the Commission to the Five Civilized Tribes certified to the Secretary of the Interior a list of names of persons to that date enrolled as entitled to membership of the Chickasaw Nation for the purpose of allotment of lands and distribution of tribal funds under the provisions of Acts of Congress providing therefor. October 6, 1905, the Secretary affirmed the Act of the Commission enrolling the relator, and later certified his approval to the Commission. The roll of members, as approved, was kept in the office of the Secretary and copies sent as required by law. Thereafter relator selected land and received a certificate of allotment, but no patent was issued.

On March 4, 1907, the Secretary of the Interior, without notice to or the knowledge of the relator, erased relator's name from the roll in his office, and caused the entry to be made opposite the name "cancelled March 4, 1907." A demand by relator for erasure of the line drawn through his name and the entry of cancellation was refused. *Held*, That the Secretary of the Interior was without power to cancel this approval and remove relator's name from the roll at the time and in the manner stated, his former actions approving the enrollment of relator being final and beyond his power to review or recall, and that mandamus would lie to compel him to undo his unlawful act in erasing relator's name from the roll and to restore relator's name thereto."

The Supreme Court of the United States, in affirming the case of *Garfield, Secretary, v. United States of America ex relatione John E. Goldsby* (211 U. S. 249), after stating the case and discussing the question of whether or not mandamus is the proper remedy, and calling attention to section 23 of the Act of July 1, 1902 (32 Stat. at L. 641), uses the following language:

"But the question presented for adjudication here does not involve the control of any matter committed to the Land Department for investigation and determination. The contention of the relator is, that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls, and the same had been certified to the commission, and he had received an allotment certificate, and was in possession of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted, and not within the authority and control over public land titles given to the Interior Department.

"By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls he had not only become entitled to participate in the distribution of the funds of the nation, but by the express terms of section 23 of the Act of July 1, 1902 (32 Stat. 641), it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein: We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under act of Congress. . . .

"In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully

the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

"The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrollment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

"The statute provides in section 30, act of July 1, 1902, *supra*:

" 'Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior,

one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.'

"The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the commission, and land was allotted to the relator, as provided by section 23 of the act of July 1st, 1902, *supra*. The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.

"The question here involved concerns the right and authority of the secretary of the interior to take the action of March 4, 1907, in summarily striking the relator's name from the roll. That is the question involved in this case.

"For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made."

Section 18. Authority of secretary to strike names from approved roll denied—continued.

Since the decision of the Goldsby case by the Court of Appeals in the District of Columbia, jurisdiction of that court has again been invoked upon appeal from the judgment of the Supreme Court of the District of Columbia ordering the restoration to the Creek Roll the name of Lucy Ann Turner. This case is reported as *James Rudolph Garfield, Secretary, Appellant, v. The U. S. of America ex rel. Lucy Ann Turner et al.* (Washington Law Reporter vol. 36, p. 410). Lucy Turner et al. applied to the Supreme Court of the District of Columbia for writ of mandamus. The statement of the controversy as made by the Court of Appeals of the District of Columbia is as follows:

"Relators alleged in their petition that they made application, as provided by law, to the Commissioner to the Five Civilized Tribes to be enrolled as freedman, members of the Creek Nation. A hearing was held at which all the parties were represented by counsel, and relators were duly

adjudged to be entitled to enrollment. No appeal was taken by the Creek Nation and, therefore, relators' names were placed upon said rolls, which were approved by the Secretary of the Interior on June 16, 1906. It is further alleged that, thereafter, upon false representation, the cases of relators were reopened and that respondent's predecessor in office, without notice to them, arbitrarily and illegally undertook to deprive them of their legal rights by directing that their names be cancelled from said rolls. It is alleged that the cancellation of relators' names was not noted on all the freedmen rolls of the Creek Nation prior to March 4, 1907.

"Respondent answered, denying the jurisdiction of the court to consider the matters referred to in the petition, and denying that relators were freedmen members or citizens of the Creek Nation, and alleged, upon information and belief, that Lucy Ann Turner procured the enrollment of herself and her five minor children, the other relators, by fraud and misrepresentation. Respondent then sets forth in detail the facts upon which the allegation of fraud predicated and alleges that an investigation was had by the Commissioner, counsel for relators having notice of the hearing, at which several witnesses were examined and evidence adduced showing that relators were not entitled to enrollment. As a result of the hearing, the Commissioner recommended that the names of relators be stricken from the rolls, and the Secretary of the Interior, on February 4, 1907, authorized and directed that the names be cancelled from said rolls. It was further alleged that no one of the relators had since been given any allotment or any certificate of allotment; that the action of respondent's predecessor was in accordance with a long established and well recognized practice with respect to the rules of the Five Civilized Tribes. The answer was verified by respondent upon information and belief. A demurrer to the answer was interposed, which was sustained by the court. The court entered a decree ordering the restoration of relators' names to the rolls. From this judgment respondent prosecutes this appeal."

The Court of Appeals thereupon decided that the demurrer admitted that the parties were not entitled to enrollment; that their enrollment was procured by fraud and perjury and held that the writ of mandamus was not a writ of right and that a person who came into court to invoke the aid of mandamus should come with clean hands.

With reference to the right of the Secretary to strike the names from the roll, the following language is used:

"Conceding that the argument of counsel for relator that the Secretary of the Interior had no power to strike these names from the approved rolls, is correct, a matter upon which we express no opinion, it is likewise manifest that he had no power, under the admission of fraud before us, to place the names originally upon the rolls. Hence we are asked to compel him to perform not only an illegal act, but to now do something he never had power to do. It is elementary that before a writ of mandamus will issue to compel the performance of an act, it must appear that the respondent has power and authority to perform the act sought to be enforced."

It is doubtful if these two opinions of the Court of Appeals of the District of Columbia are entirely consistent.

The affirmance of the decision in the Goldsby case by the Supreme Court of the United States, sets at rest for all time its correctness. The decision in the Lucy Ann Turner case has not, as yet, been passed upon by the Supreme Court of the United States.

Section 19. Final rolls; effect of wrongfully striking name of member therefrom.

The final rolls of members of the Choctaw and Chickasaw Tribes contain the names of members of the tribes, whether by blood, intermarriage, or adoption, including Mississippi Choctaws, and Choctaw and Chickasaw Freedmen who were living on the 25th day of September, 1902, and the names of children born to members by blood of either of said tribes subsequent to the 25th day of September, 1902, and prior to the 4th day of March, 1905, and who were living on the last-mentioned date. Only those persons whose names appear upon the rolls are entitled to participate in the lands and moneys of the tribes.

An interesting question is presented where the Secretary of the Interior has stricken from the final roll, after it has received his approval, the names of persons appearing thereon at the time of his approval. It has been recently decided by the Supreme Court of the United States that the Secretary had no right to so strike names from the approved rolls; that his action in so doing was wrongful, and he has been ordered to restore the names of certain persons who were parties to the particular controversy in which the judgment was rendered. If the name of a member of the tribe appeared upon the roll as ap-

proved by the Secretary of the Interior would the erasure of his name from the roll deprive him of his tribal rights until its restoration to the roll? In reason it would seem that a wrongful act performed without authority of law ought not to be permitted to deprive a member of the valuable rights of membership. It would be the better and fairer course to disregard the action of the Secretary and treat the name of the member as though still upon the roll for all purposes involving membership rights in the tribes or tribal property.

The rolls prepared as hereinbefore outlined indicate whether the person enrolled is a member by blood, intermarriage, adoption, a new born, Mississippi Choctaw or Freedman. The term "new born" is used to indicate those members of the tribes by blood born between the 25th day of September, 1902 and March 4, 1905, and who were living on the last-mentioned date. In all cases where the enrollment record indicates a member to be such by blood it also shows the supposed quantum of Indian blood and the supposed age of the person calculated to September 25, 1902.

Section 20. Mississippi Choctaws; origin of right.

The rights of the Mississippi Choctaws are founded upon Article 14 of the treaty of 1830 between the Choctaws and the United States (7th U. S. Statutes, 333), which is as follows:

"Each Choctaw head of a family, being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

The Act of June 28, 1898, authorizes the Commission to the Five Civilized Tribes to determine the identity of the Choctaw Indians claiming rights to Choctaw lands. Under Article 14, above quoted (30 U. S. Statutes, 503), provision is made that the rolls of the Mississippi Choctaws, as made by the Commission, shall be subject to the supervision and approval of the Secretary of the Interior, and shall become final only when approved by him. In 1900 other legislation was enacted providing that any Mississippi Choctaw duly identified as such by such Commission should have the right at any time prior to the approval of the final rolls of the Choctaw and Chickasaws to make settlement in the Choctaw or Chickasaw country, and upon proof of the fact of bona fide settlement to be enrolled by the Secretary of the Interior as other Choctaws entitled to enrollment. (31 U. S. Statutes, 236).—Apparently, prior to the time of the enrollment of the Mississippi Choctaw, his rights in the Chickasaw and Choctaw Nations were no greater than those of a non-citizen. *Ikard v. Minter*, 4 Ind. Ter. Court of Appeals, 214.

Section 21. Mississippi Choctaws; rights of, how perfected.

By Section 41 of the Supplemental Agreement (32 U. S. Statutes, 641), it is provided that all persons identified by the Commission under previous laws as Mississippi Choctaws may “at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission make bona fide settlement within the Choctaw and Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mississippi Choctaws entitled to allotment as herein provided for citizens of the tribes subject to special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior.”

The Mississippi Choctaws were required to be enrolled upon separate rolls.

By Section 42 it was provided that

“When any such Mississippi Choctaw shall have in good faith continuously resided upon the lands of the Choctaw and Chickasaw Nations for a period of three years, including his residence thereon before and after such enrollment, he shall, upon due proof, of such continuous bona fide resi-

dence, made in such manner and before such officer as may be designated by the Secretary of the Interior, receive a patent for his allotment as provided in the Atoka Agreement and he shall hold the lands allotted to him as provided in this agreement for citizens of the Choctaw and Chickasaw nations."

Section 44 is as follows:

"If within four years after such enrollment any such Mississippi Choctaw, or his heirs or representatives if he be dead, fails to make proof of such continuous bona fide residence for the period so prescribed, or up to the time of the death of such Mississippi Choctaw, in case of his death after enrollment, he, and his heirs and representatives, if he be dead shall be deemed to have acquired no interest in the lands set apart to him, and the same shall be sold at public auction for cash, under rules and regulations prescribed by the Secretary of the Interior, and the proceeds paid into the Treasury of the United States to the credit of the Choctaw and Chickasaw tribes, and distributed per capita with other funds of the tribes. Such lands shall not be sold for less than their appraised value. Upon payment of the full purchase price patent shall issue to the purchaser."

The certificate issued by the Commission to the Five Civilized Tribes to the Mississippi Choctaws differs very materially from the certificate issued to other members of the tribes. It shows on its face the limitation, that the terms of the statute must be complied with before the rights become absolute. Upon the compliance with the terms of the statute the relation of the Mississippi Choctaw to his allotment becomes the same as that of any other member of the Choctaw or Chickasaw tribes who has selected an allotment. The manner of selecting his allotment, manner of contesting, time for contest and the time for issuance of certificate, are all controlled by the general laws applicable to like subjects affecting the Choctaws and Chickasaws.

CHAPTER IV.

NATIONAL CITIZENSHIP.

Section 22. National citizenship; effect of conferring upon Chootaws and Chickasaws.

On the third day of March, 1901, that part of the Act of 1887 conferring citizenship upon allottees who had received their patents having special reference to Indians outside of the Indian Territory. (24 U. S. Statutes at Large, 390), was amended by adding the words "and every Indian in the Indian Territory," which made that part of the law applicable to the Indians of the Indian Territory read as follows:

"And . . . every Indian in the Indian Territory is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." (31 U. S. Stat. L., p. 1447.)

This Act did not remove any existing restrictions upon alienation. *Beck v. Flourney Live Stock & Real Estate Co.*, 65 Fed. 30; *United States v. Flourney Live Stock & Real Estate Co.*, 69 Fed. 886; *Id.*, 71 Fed. 576; *Jones v. Meehan*, 175 U. S. 1. While it did not remove restrictions upon alienation, it certainly did not impose any, and conferred upon the Indian thus made a citizen of the United States all the "rights, privileges and immunities, of such a citizen." This gave the Indian in the Indian Territory the same liberty contract and right to convey his property that any other citizen of the United States residing in said Territory had except where there was a positive inhibition against alienation. *In Re Heff*, 197 U. S. 488. In dealing with the subject of the alienation of land by members of the Five Civilized Tribes residing in the Indian Territory, it should be borne in mind that these Indians are no longer wards of the United States, but full-fledged citizens, hampered only by such conditions and restrictions as existed at the time they were made citizens.

The full text of the Bill conferring citizenship upon "every Indian in the Indian Territory" is in the following language:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That Section 6, Chapter 119, numbered 24, page 390, is hereby amended as follows, to-wit:

"After the words 'civilized life' in line thirteen of section six, insert the words 'and every Indian in the Indian Territory.'"

The report of Senate Committee on Indian Affairs on this Bill made on the 28th day of February, 1901, being numbered 2483, after reciting conditions previously existing in the Indian Territory, sums up the reasons why citizenship should be conferred upon the Indians in the Indian Territory, in the following language:

"These governments are now completely changed and this reason has disappeared. . . . The independent self government of the Five Civilized Tribes has practically ceased. The policy of the Government to abolish classes in the Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of the Indian Territory to protect their rights, they should be given the rights of United States citizenship immediately. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled. . . . It is doubtful whether under the statutes these Indians can perform any of the usual personal business engagements which are taking place daily on a vast scale in the Indian Territory without a technical violation of the laws requiring supervision of the Indian people, but all questions with regard to this matter should be eliminated by giving them legal rights equal with other men."

The provisions of the subsequent agreement conferring citizenship at certain stages in the progress of the administration of the affairs of the members of the tribes, were inserted not in recognition of the fact that these Indians had not become citizens of the United States, but for the purpose of assuring them at each step of the rights and privileges of citizenship in the United States.

These Agreements were some years in process of preparation and in all probability provisions relating to citizenship were drawn and agreed upon prior to the passage of the Act of March 3, 1901.

Section 23. National citizenship as affected by Enabling Act.

On the 16th day of June, 1906, the President approved an Act providing

"That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a Constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." (34 Stat. at L., pt. 1, 267).

Is this provision a reservation of the right to deal with tribal Indians and tribal property, or is it a reservation of the right to deal with the individual Indian who has become a citizen of the United States and of the State of Oklahoma? The phraseology would indicate that the right reserved was to deal with the Indians, touching their tribal and tribal property rights. This is indicated by the provision "by treaties, agreement, law, or otherwise." It is hardly possible that the government contemplated entering into a treaty or making an agreement with an individual Indian. This section makes no provision for continuing in force any particular laws especially applicable to the Indians, nor does it reserve any jurisdiction in the courts of the United States to administer either the tribal property or the property of the individual allottee. The proviso is simply that the right of the United States to make any law or regulation respecting the Indians or their lands, property or other rights by treaties, agreement, law or otherwise shall not be limited by the admission of Oklahoma into the Union.

Paragraph 3 of section 3 of the Enabling Act (34 Stat. at L., pt. 1, p. 269) is as follows:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within

the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

From the peculiar wording of this provision the distinction between the right reserved as to Indian lands and as to public lands of the United States is clearly apparent. The people of the State of Oklahoma disclaim all right and title in and to both public lands and lands held by any Indian tribe or nation, but it is only the public land that "shall be and remain subject to the jurisdiction, disposal, and control of the United States." It is clearly evident by the distinction drawn, when these two classes are placed in juxtaposition, that it was not the intention of the United States that the lands owned or held by any Indian tribe or nation should be and remain subject to the jurisdiction and control of the United States.

The sixth paragraph of section 3 is that "said state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude."

Section 3 of the Enabling Act contains the following provision:

"The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States, and the principles of the Declaration of Independence."

Evidently the provision in the Enabling Act with reference to discrimination on account of race or color has special significance when it is considered that a large percentage of the population of both territories is of Indian descent.

Section 2 of the Enabling Act provides:

"That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State."

Under the further provisions of the Enabling Act the same class of electors are to select the State officers and five members of Congress. At the election, C. D. Carter, a full-blood Indian, was elected as a Representative to the Lower House of Congress. It was at one time suggested that objection would be made to the qualification of Mr. Carter as a member of Congress, not because he was not a citizen of the United States, but because he had not been a citizen for seven years at the time of his election, that is seven years had not expired since all the Indians in the Indian Territory had been made citizens of the United States. Inasmuch, however, as the seven years had expired at the time Mr. Carter was sworn in, no objection was offered or urged against his qualifications to sit in the lower House of Congress.

Section 4 of the Enabling Act provides that upon a compliance with the terms and conditions thereof, the proposed States of Oklahoma "shall be deemed admitted by Congress into the Union under and by virtue of this Act, on an equal footing with the original States."

The terms of the Enabling Act were duly accepted by the Constitutional Convention (Bunn's Const., sec. 497). A constitution was prepared and submitted to the people and adopted by an overwhelming majority and the State of Oklahoma was, by proclamation of the President of the United States, admitted into the Union on the 16th day of November, 1907, on an equal footing with the original States.

In the case of *Boyd v. Thayer*, 143 U. S. 175, the Supreme Court of the United States had under consideration the question of whether or not James E. Boyd, a resident of the Territory of Nebraska and who had declared his intention to become a citizen of the United States prior to the admission of Nebraska as a State, became by such admission a citizen of the United States. The opinion was by Chief Justice Fuller and we quote therefrom as follows:

"So far as the original States were concerned, all those who were citizens of such States became upon the formation of the Union citizens of the United States and upon the admission of Nebraska into the Union 'upon an equal footing with the original States, in all respects whatsoever,' the citizens of what had been the Territory became citizens of the United States."

As remarked by Mr. Chief Justice Waite in *Minor v. Hartsitt*, 21 Wall, 162, 167:

“Whoever then was one of the people of these States when the Constitution of the United States was adopted, became ipso facto a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there never has been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship of they were.”

In *Bolln v. Nebraska*, 176 U. S. 88, the following language is used:

“Indeed, the legislation of Congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of *Boyd v. Thayer* (143 U. S. 135), and the conclusion reached upon its admission into the Union the citizens of what had been the Territory became citizens of the United States and of the State.”

Again recurring to the case of *Boyd v. Thayer*, supra, the result of that opinion is perhaps best expressed in paragraphs 8 and 9 of the syllabus:

“(8) That Congress has the power to effect a collective naturalization on the admission of a State into the Union, and did so in the case of Nebraska;

“(9) That the admission of a State on equal footing with the original States involves the adoption, as a citizen of the United States, of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the assent of Congress.”

The terms of the Enabling Act conferred upon every Indian in either Oklahoma or Indian Territory all of the indicia and privileges of citizenship, and it seems impossible to escape the conclusion that the admission of the two Territories as a State upon an equal footing with the other States of the Union, resulted in the naturalization of those Indians who had not prior to said time become citizens of the United States.

The Enabling Act made no distinction on account of either race or color and required the new State to incorporate in its constitution a provision prohibiting discrimination on account of race or color. To deny the Indians in the State of Oklahoma the rights of citizenship, because of the fact that they are racially

described as Indians, would be a violation of both the spirit and terms of the Enabling Act and the Constitution of the State of Oklahoma. (*U. S. v. Hall*, 171 Fed. 214; *U. S. v. Ashton*, 107 Fed. 509; *U. S. v. Leslie*, 167 Fed. 670.)

Section 24. Did Congress attempt to repeal the Act conferring citizenship on the members of the Five Civilized Tribes, and if it did so, was it successful?

On March 3, 1901, the President approved an act amending Section 6 of the General Allotment Act of 1887, by inserting therein after the words "civilized life" "every Indian in the Indian Territory" (31 Stat. 1447). The Act as amended reads as follows:

"Sec. 6. (Citizenship to be accorded to allottees and Indians adopting civilized life.) That upon the completion of said allotments and the patenting of lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provision of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and *every Indian in the Indian Territory* is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Under the provisions of this Amendment every Indian in the Indian Territory at once became possessed of all of the rights, privileges, and immunities of a citizen of the United States.

On the 8th day of May, 1906, the President approved an Act entitled "An Act To amend Section six of an Act approved February 8, 1887, entitled 'An Act to provide for the allotment

of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.' ”

This amendment is as follows :

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Section six of an Act approved February 8th, eighteen hundred and eighty-seven, entitled ‘An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes’ be amended to read as follows :

“SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside ; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed but said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indian in the Indian Territory.

"That hereafter when an allotment of land is made to any Indian and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indians, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.'" (34 U. S. Stat. at L., p. 182-3).

This amendment, or substituted provision, is peculiar in several particulars. In the first place it is made a substitute for the original Section 6 of the Act of February 8, 1887. It seems to entirely disregard the subsequent amendment of this Act by which every Indian in the Indian Territory was made a citizen of the United States. It differs materially in many of its provisions from the original Section 6. By a special proviso it is declared that the provisions thereof shall not apply to any Indian in the Indian Territory. If the provisions do not apply to any Indian in the Indian Territory, they should not be held to apply for the purpose of repealing the rights of citizenship conferred upon every Indian in the Indian Territory by the Act of 1901.

The rights of the allottees of the Five Civilized Tribes to citizenship, however, are not alone dependent upon the amendment of 1901 to Section 6 of the Act of 1887. Section 15 of the Act of March 3, 1893 (27 Stat. 612, 645) reads:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease."

Under the provision, "Upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States," therefore, independently of the Amendment of 1901 to the Act of 1887, each member of the Five Civilized Tribes, upon the allotting to him of his pro rata share of the lands of his tribe, probably became a citizen of the United States.

Discussing the subject of the modern policy of the government of the United States in dealing with the Indians, the Supreme Court of the United States *In The Matter of Heff*, 197 U. S. 499, uses the following language:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishment of separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship, and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true that there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end. . . .

"We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the government the relation of guardian and ward, and that the statute we are considering is not altogether novel in the history of Congressional legislation."

The authority of Congress to destroy citizenship thus conferred is denied in the same manner in the following language:

"We are of the opinion that when the United States grants the privilege of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the

laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; *that the emancipation from Federal control thus created cannot be set aside at the instance of the Government* without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

While no State existed to exercise authority over the Indians at the time of the passage of the Amendment of May, 1906, and it was therefore unnecessary to secure the consent of the State to repeal, if such was intended, there was no attempt to secure the consent of the individual Indian.

The Supreme Court having said that such repeal would be ineffectual without the consent of the individual Indian, seems to have settled that Congress is without authority to deprive an Indian who has had conferred upon him citizenship in the United States of that right without his consent.

The authorities cited in support of the contention of both the United States and of Heff in *in re Heff*, supra, are as follows: *State v. Denoyer*, 72 N. W. 1015; *State v. Norris*, 55 N. W. 1086; *Wa La etc., v. Carter*, 53 Pac. 106; *U. S. v. Rickert*, 106 Fed. 5; *In re Zhuck*, 76 Pac. 877; *Boyd v. Nebraska*, 143 U. S. 162; *U. S. v. U. S.* 164 U. S. 240, 246; *U. S. v. Kopp*, 110 Fed. 166; *U. S. v. Cruikshank*, 92 U. S. 542; *Dred Scott v. Sanford*, 19 How. 476; *Lyons v. Cunningham*, 14 Pac. 938; *Blank v. Pausch*, 113 Ill. 60; *People v. Bray*, 38 Pac. 731; *U. S. v. Ward*, 1 Kan. 604; *State v. Campbell*, 55 N. W. 553; *The Kansas Indians*, 5 Wall. 737; *French v. French*, 52 S. W. 517; *Raymond v. Raymond*, 33 Fed. 723; *United States v. Rogers*, 4 How. 567; *Beck v. Flournoy Co.*, 65 Fed. 35; *Keokuk v. Ulam*, 38 Pac. 1080; *U. S. v. Hadley*, 99 Fed. 437; *Eels v. Ross*, 64 Fed. 417; *Gassies v. Ballon*, 6 Pet. 761; *U. S. v. Kagama*, 118 U. S. 375; *State v. Williams*, 43 Pac. 15; *People v. Ketcham*, 15 Pac. 353; *State v. Newell*, 24 Atl. 943; *Stevens v. Thatcher*, 39 A. R. 282; *U. S. v. Hershman*, 53 F. R. 543; Act of Mar. 3, 1871, now section 2079, Rev. Stat.; Act of Mar. 3, 1885; *Farrell v. U. S.*, 110 Fed. 942; *State v. Wise*, 72 N. W. 843; *State v. Lee*, 38 S. W. 583; *Breechbill v. Randall*, 1 N. E. 362; *New v. Walker*, 108 Ind. 365; *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12; *Hockett v.*

State, 5 N. E. 181; *Board of Excise v. Barrie*, 34 N. Y. 666; *U. S. v. DeWitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462, 475; *Slaughter House Cases*, 16 Wall. 36; *U. S. v. Rickert*, 188 U. S. 432, 15 Am. and Eng. Enc. (2nd Ed.), 20; *Johnson v. Southern P. R. R. Co.*, 196 U. S. 1; *U. S. v. Holliday*, 3 Wall. 407; *U. S. v. 43 Gal. Whiskey*, 93 U. S. 188; *State v. Campbell*, 53 Minn. 354; *U. S. v. Ward*, McCahon's Rep. 199; *U. S. v. McBratney*, 104 U. S. 621; *Utah Northern Ry. Co. v. Fisher*, 116 U. S. 28; *Cherokee Nation v. Hitchcock*, 187 U. S. 308, 294; *Lone Wolf v. Hitchcock*, 187 U. S. 567, 553; *Farrell v. U. S.*, 160, 110 Fed. 942; *Eels v. Ross*, 64 Fed. 417; *U. S. v. Logan*, 105 Fed. 240; *U. S. v. Flourney L. S. Co.*, 69 Fed. 886; *U. S. v. Mullin*, 71 Fed. 682; *U. S. v. Belt*, 128 Fed. 168; *U. S. v. Kiya*, 126 Fed. 879; *In re Lincoln*, 129 Fed. 247; *Mulligan v. U. S.*, 120 Fed. 98; *Crowley v. Christensen*, 137 U. S. 86; *Farrell v. U. S.*, ut supra; *Worcester v. Georgia*, 6 Pet. 565; *Fellows v. Blacksmith*, 19 How. 366; *Cherokee Nation v. Southern Kansas Ry.*, 135 U. S. 641; *Stevens v. Cherokee Nation*, 174 U. S. 445, 484; *Renfrow v. U. S.*, 3 Okla. 166, section 2139, Rev. Stat.; *U. S. v. Ritchie*, 17 How. 525, 540; *Minnesota v. Hitchcock*, 185 U. S. 373; *State ex rel. v. Denoyer*, 6 N. D. 586; *State ex rel. v. Norris*, 37 Neb. 299; *Wa-La-Note-Tke-Tyin v. Carter*, 6 Idaho 85; *In re Now-Ge-Zhuck*, 76 Pac. 877; *U. S. v. Rickert*, 106 Fed. 1, 5.

It is believed, however, that a careful consideration of the provisions of this Act discloses that there was no intention whatever on the part of Congress to affect the citizenship theretofore conferred upon every Indian in the Indian Territory. Its evident purpose was to postpone the citizenship of all allottees who had not already become citizens of the United States from the date when allotments were made to such Indians to the date when they received a patent in fee simple. The provision in the original Section 6 is as follows: "And every Indian born within the Territorial limits of the United States to whom *allotments shall have been made* under the provision of this Act . . . is hereby declared to be a citizen of the United States, etc."

The amended provision is as follows: "And every Indian born within the Territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, . . . is hereby declared to be a citizen of the United States, etc."

No doubt this Act was passed in order to establish the contention made by the Attorney-General in the Supreme Court of the United States in the *Heff* case, that the right of citizenship did not attach until the issuance of final patent. The further fact that Congress was careful to add the proviso "That the provisions of this Act shall not extend to Indians in the Indian Territory," evidences an explicit intention not to interfere with the citizenship conferred by the Act of 1901. It further evidences the general intention of Congress to except the Indians in the Indian Territory from general legislation affecting tribal Indians.

CHAPTER V.

ALLOTMENT.

Section 25. Allotment.

It was provided in the Supplemental Agreement that there should be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval of his enrollment by the Secretary of the Interior, "lands equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations; to conform as nearly as may be to the areas and boundaries established by the government survey which land may be selected by each allottee so as to include his improvements."

Pursuant to this provision, Land Offices were established at Atoka, Choctaw Nation, and Tishomingo, Chickasaw Nation, and the process of allotment began about December 1, 1903. Exclusive jurisdiction was conferred upon the Commission to determine under the direction of the Secretary of the Interior all matters pertaining to the allotment of lands. Any member of a tribe desiring to assert his preference right to select a given tract of land in allotment appeared at the Land Office and presented his application to be permitted to do so. This application contained a statement showing, either that the land sought to be selected was public domain, or that the applicant was the owner of the improvements upon the same. Any member of a tribe desiring to assert his preference to select such tract in allotment was given permission to appear before the Commission within nine months after the original selection thereof and file a contest denying the right of the party first making the selection to take the land in allotment and asserting his own superior right to select the same. Thereupon summons was issued and served upon the party making the first selection, and the case was tried before the Commission to the Five Civilized Tribes as contests are ordinarily tried in the Land Offices, and judgment entered determining which of the parties was entitled to take the land in allotment. From this judgment an appeal might be prosecuted to the Commissioner of Indian Affairs and from the Commissioner of Indian Affairs to the Secretary of the Interior.

At the expiration of nine months, if no contest had been filed, an allotment certificate was issued to the person who had selected the same in allotment. If a contest had been filed, certificate was issued to the member found to be entitled to take the land in allotment. The certificate was followed by a patent subsequently issued when sufficient time was found to prepare the same, have it executed by the Principal Chief of the Choctaws, the Governor of the Chickasaws, approved by the Secretary, recorded and delivered.

By the Act of April 26, 1906, it was provided that after the expiration of nine months from the time of the original selection of an allotment of land by a member of the Choctaw and Chickasaw Tribes and after six months from the date of the Act as to allotments theretofore made, no contest should be instituted.

Certificates of allotment were sometimes erroneously issued and delivered before the expiration of the contest period and occasionally during the pendency of a contest. When the error was discovered, a return of the certificate was demanded, and this request was occasionally complied with. It has been contended that such issuance of the certificate passed title and terminated the contest. Such a rule has little foundation in reason to support it. It is absurd to say that the mistake of a clerk in an administrative office could operate to divest rights fixed by the terms of a positive statute.

Section 26. Authority of secretary to cancel allotments.

The Supreme Court of the United States has very recently affirmed the judgment of the Court of Appeals for the District of Columbia, ordering the names of Goldsby and Allison to be restored to the tribal rolls. Many of the members of the tribes stricken from the rolls by the Secretary had selected their allotments, and the most of them had received allotment certificates and some of them patents. Upon the striking of the names of those members from the rolls, the Secretary of the Interior undertook to cancel their allotments and to allot their lands to other members of the tribes. It is believed that the action of the Secretary in thus arbitrarily cancelling their allotments was ineffectual as to those persons to whom patents had been issued. If the decision of *Wallace v. Adams*, 143 Fed. 716, is correct in its declaration that the allotment certificate "is an adjudication of the special tribunal empowered to decide

the question that the party to whom it is issued is entitled to the land, and is a conveyance of the right to this title to the allottee," then the cancellation was ineffectual as to those cases in which allotment certificates had been issued.

It is not believed that the Secretary of the Interior has arbitrary power to cancel an allotment properly selected by a duly enrolled member of the tribe, whose enrollment he has finally approved. It is possible that there might be such fraud as would vitiate the enrollment, but the fraud which it would require to vitiate the judgment enrolling the member, ought to be of the same character that it would require to vitiate the judgment of a court or other tribunal acting in judicial capacity. A preference right being given in the selection of an allotment to select the same so as to include the improvements of a member and the selection having been made and approved, and the enrollment of the member having been finally approved, it is difficult to see how any legal means could be found to divest the party making the selection of his right thereto, except in the manner provided by law; that is, by contest proceedings regularly instituted within the period provided for the filing of contest. The person who examines abstracts will occasionally be presented with one showing two certificates of allotment and possibly, in some cases, two patents; the result of the Secretary's action in undertaking to cancel the enrollment of the members and the allotments made to such members, and to allot the same lands to other members.

CHAPTER VI.

RESTRICTIONS UPON ALIENATION.

Section 27. Allotted lands are alienable in the absence of restrictions imposed.

The rule with reference to allotted Indian lands is, that such lands are alienable upon allotment in severalty in the absence of some statute or agreement imposing restrictions upon alienation. General Statutes of the United States prohibiting alienation by Indians, apply only to the public or tribal lands held in common and not to the lands of the individual Indian after allotment in severalty.

In the case of *Doe v. Wilson* (23 How. 463), Mr. Justice Catron, speaking for the Supreme Court of the United States, states the rule as follows:

“Although the Government alone can purchase lands from an Indian Nation, it does not follow that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited its sale.”

The rule as declared by the same court in the case of *Taylor v. Brown*, 147 U. S. 646, is stated in the following language:

“The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeit his estate by violating it (1 Prest. Est. 477), and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage and entitled to special protection (*Pickering v. Lomax*, 145 U. S. 310; *Felix v. Patrick*, 145 U. S. 317, 330), yet the proviso in question may fairly be held to have been adopted in view of general principles.”

In the case of *Jones v. Meehan*, 175 U. S. 1., the rule is summarized in the syllabus as follows:

“When the United States in a treaty with an Indian tribe, and as a part of the consideration for the cession of the tribe of a tract of country to the United States, make

a reservation to a chief or other member of the tribe of a specified member of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States by a provision of the treaty, or of an Act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Other cases bearing upon this question, are as follows: *French v. Spencer*, 62 U. S. 228; *Crews v. Burcham*, 1 Black 352; *Francis v. Francis*, 99 N. W. 14, 203 U. S. 233; *Schrimscher v. Stockton*, 183 U. S. 290; *Doe v. Wilson*, 20 Minn. 356; *Quinney v. Denney*, 18 Wis. 485; *Ruggles v. Marsillilot*, 19 Wis. 173.

Section 28. Alienation of inherited homestead.

The allotment of land to the Choctaws and Chickasaws and freedmen was made pursuant to the terms of the Supplemental Agreement heretofore referred to, and the subject of restrictions upon alienation is dealt with in Sections 12, 13, 15 and 16 of said agreement. Section 12 is as follows:

"Each member of said tribe shall, at the time of the selection of said allotment, designate as a homestead out of said allotment, land equal in value to 160 acres of the average allottable lands of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificates and patents shall issue for said homestead."

The restrictions upon the alienation of the homestead are during the lifetime of the allottee and not exceeding twenty-one years. If the allottee lives the full twenty-one years, his homestead becomes alienable at the expiration of that time; if he dies within twenty-one years, it becomes alienable immediately upon his death. There is no suggestion of any extension of restrictions upon the alienation of the homestead beyond the lifetime of the allottee, nor could these restrictions upon alienation be properly construed as running with the land. They are wholly personal in their nature and cease upon the death of the allottee. *Clark v. Lord*, 20 Kan. 390; *Doe v. Wilson*, 23 Howard 463; *Briggs et al. v. Washpukque*, 37 Fed. 135; *Oliver v. Forbes*.

17 Kan. 113; *Briggs et al. v. McClain et al.*, 23 Pac. 1045; *Lowry v. Weaver*, 4 McClain 82, Federal Case 8584; *Campbell v. Paramore*, 17 Kan. 639; *Frederick v. Gray*, 12 Kan. 518; *McMahon v. Welsh*, 11 Kan. 280; *Commissioner of Miami County v. Brackenridge*, 12 Kan. 114; *Godfrey v. Iowa Land & Trust Co. (Okla.)*, 95 Pac. 792; *DeGraffenreid v. Iowa Land & Trust Co. (Okla.)*, 95 Pac. 624; *Jones v. Mehan*, 175 U. S. 1; *Hancock v. Mutual Trust Co.*, 103 Pac. 566.

Section 29. Alienation; inherited surplus.

Section 16 of the Supplemental Agreement above referred to is as follows:

"All lands allotted to members of said tribes except such as is set aside to each as a homestead as herein provided, shall be alienable after issuance of patent as follows: one-fourth in acreage in one year; one-fourth in acreage in three years, and the balance in five years, in each case from date of patent. Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw or Chickasaw Tribal governments for less than its appraised value."

The lands allotted under this provision of the agreement are commonly known and described by the terms "surplus lands." This term will be used in describing the same because it is short and its meaning is generally understood. Do these surplus lands become alienable upon the death of the allottee provided he dies before the expiration of the time at which said lands would have become alienable if he had continued to live?

This presents a very serious question and one that cannot be considered free from doubt. For almost a century various restrictions, differing much in their phraseology, have been placed upon the alienation of lands allotted in severalty to members of the various tribes. So far as the writer has been able to discover, none of the previous restrictions have been worded in the language contained in Section 16, nor in language of like import. In previous instances the language of the statute has either made the restrictions more clearly of a personal nature, or has fixed them more definitely upon the land than does the above provision. The usual restriction runs against alienation by either the allottee or his heirs for a given period or until the happening of a specific contingency. See authorities cited under Section 28: also *Clark v. Libby*, 14 Kan. 435. 118 U. S. 250, 30 Lawyers' Ed.. 133; *Taylor v. Brown*. 40 N. W.. 525;

Peoria and Miami Indians, 29 Land Decisions, 239; Letter of Assistant Attorney-General Campbell to Secretary of Interior, June 8, 1904. The purpose of construction is to arrive at the intent of the legislators. If the language is clear and free from doubt, there is no room for construction. The language used with reference to the alienation of surplus lands is not so free from doubt nor is its meaning so easily discernible as not to require construction to ascertain what is meant.

Recurring to the language used in Sections 12, 13 and 16, it will be noticed that the word "heir" does not appear in any one of said sections except in the proviso of Section 16. The body of Section 16 is that "all lands allotted to the members of said tribe, except such land as is set aside for each as a homestead as herein provided, shall be alienable after issuance of patent as follows." And this is an affirmative provision. The language is not that the lands shall not be alienable until after issuance of patent, but is a declaration that they shall be alienable under certain conditions in a certain time after issuance of patent. This is not in itself a restriction upon alienation. It is a positive provision permitting alienation under certain conditions. It might well have been and probably was contemplated that the lands under some other provision would become alienable sooner than provided in section 16, but that in any event under the terms of this section if they had not otherwise become alienable they should become alienable in one, three and five years after the issuance of patent. Wherever Congress undertook to absolutely limit alienation it did so by negative provision, limiting or denying the right to alienate and not by an affirmative provision providing that the lands should become alienable at a given time. The most that can be said in support of this provision as a restriction upon alienation is that Congress at that time recognized that there were existing restrictions and that it intended to provide that whatever the conditions might be that in no event should these restrictions extend beyond the time provided in Section 16.

Section 30. Alienation; inherited surplus—Continued.

It will be noted that the first time the word "heirs" appears anywhere in this statute dealing with restrictions upon alienation of lands allotted to the members of the Choctaw and Chickasaw Tribes is in the proviso to Section 16, and that pro-

viso is that such land shall not be alienable by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value. This proviso certainly contemplates that the surplus land will become alienable by the heirs and possibly by the allottee before the expiration of the tribal government. If it had not been so contemplated it would not have been necessary to insert the proviso fixing a minimum price at which the lands might be sold.

Viewed in the light of conditions surrounding the Indians when they made the treaty and voted for its adoption, it is less difficult to arrive at a proper construction of this provision. There was allotted to the members of the Choctaw and Chickasaw Tribes only 320 acres of the average allotable lands of the Tribes. These two tribes were thought at that time to own a sufficient acreage to allot to each member 500 acres of average allotable land. The subsequent addition of names to the tribal roll will probably reduce the amount that can be actually allotted to about 450 acres. If it had been thought for the best interest of the members of the tribes that they should own more than 320 acres of the average allotable land each, it seems that Congress would have allotted to them an additional acreage. The surplus over and above that which is allotted to members and Freedmen is to be sold and the money divided. This ought to be conclusive of the fact that both Congress and the tribes were of the opinion that 320 acres of the average land was all that the Indian could beneficially use as an allotment. This allotment was not limited to the adult members of the tribe but every member thereof, whether he was rocked in the cradle, a full grown man in possession of all of his faculties, or tottering on the edge of the grave, was provided with a full allotment. What reason could have prompted either Congress or the tribes to have thus restricted the alienation of inherited land when both had recognized by their action that 320 acres was the maximum limit of land which could be beneficially used by a member of the tribe. Further, the homestead, which was considered the more valuable part, was made alienable immediately upon the death of the allottee. Is there any reason to suppose from the language used or the considerations prompting the insertions of these provisions in the agreement, that it was deemed

advisable that the surplus lands should remain inalienable for a longer period than the homestead? While this provision is not absolutely clear, when considered in the light of the other provisions of the treaty and of the conditions surrounding the members of the tribe when they voted to adopt the same, much of the difficulty disappears. However, the Attorney-General of the United States has rendered an opinion that the surplus lands are not alienable by the heirs of the allottee until the expiration of the time limit, and has instituted suits on behalf of members of the tribe to cancel conveyances made after the death of the allottee by his heirs but prior to the expiration of the time mentioned. That is, to-wit, one, three and five years after the date of patent. This provision was modified by acts of April 26, 1906, and May 27, 1908.

Section 31. Alienation of fractional parts of surplus allotment.

Section 16 of the Choctaw-Chickasaw Supplemental Agreement is as follows:

“....And all lands allotted to members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from date of patent: *Provided*, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw Tribal governments for less than its appraised value.”

Whether the lands thus selected become alienable upon the death of the allottee before the expiration of five years from date of patent has been discussed in sections (28 to 30). It is the purpose in this section to discuss some of the peculiarities of the provision which permits the alienation of one-fourth in acreage in one year, of one-fourth in acreage in three years, and the balance in five years after date of patent. What is meant by “date of patent” is discussed in the subsequent section.

It is material in determining the effect of this statute to consider the method of ascertaining the particular part of the land which becomes alienable within the periods fixed by the terms of the Act. The provision is “one-fourth in acreage.” This evidently means that the allottee may, after the expiration of one year, convey an acreage equal to one-fourth of the total acreage allotted to him in excess of his homestead allotment. Con-

gress does not seem to have attempted to legislate with reference to the value, but solely with reference to acreage. In the earlier days, after the expiration of one year from date of patent conveyances were taken of an undivided one-fourth interest in the surplus allotment. Subsequently purchasers ascertained the exact number of acres of land allotted to an allottee as his surplus allotment and then took a conveyance of a specified and definite number of acres equal to one-fourth of such surplus allotment. Occasionally, the deed was taken to the entire allotment on the theory that it passed a good title to the one-fourth which the allottee had a right to sell. There may be some question as to the validity of such a conveyance, because it was evidently contemplated by Congress that the one-fourth to be conveyed should be a segregated interest and not a joint and undivided interest.

Speaking with reference to this same subject, the Supreme Court United States in the case of *Wiggan v. Conolly*, 163 U. S. 61, uses the following language:

“Even then we should be confronted with the proposition, that under the seventh article of the treaty of 1862 it was provided that forty acres, including therein the houses and improvements of the allottee, should be inalienable during his or her life. While that provision continued in force it may well be doubted whether a deed of the entire allotment, whether made by the individual or a guardian, would be sufficient to transfer a legal title to any portion of the allotment, and whether, prior to any such deed, there must not be a setting off to the allottee according to the demand of the treaty of the inalienable forty acres. It must be borne in mind that the proceeding in the state court was not in any sense one in partition, or an equitable suit to determine relative rights in a single tract, but was a legal action to recover possession, against which was set up simply an alleged legal title in defeat thereof.”

Section 32. Date of patent; how determined.

Under Section 16 some question has arisen as to what is the proper date of the patent. The patent is prepared in the office of the Commission to the Five Civilized Tribes, sent in some instances to the Principal Chief of the Choctaw Nation first, to be executed by him, then to the Governor of the Chickasaw Nation, to be executed by him, and then sent to the Secretary of the Interior for his approval. Sometimes the procedure

is reversed and the deed is sent to the Governor of the Chickasaw Nation first, then to the Principal Chief of the Choctaw Nation, and then to the Secretary of the Interior for his approval. The Nations long felt that the Secretary of the Interior had no jurisdiction over their deeds after they were executed by the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation. No direct authority was anywhere conferred upon the Secretary. He insisted, however, that these deeds were subject to his approval by virtue of his general supervisory authority over the affairs of the Indian tribes throughout the United States. The tribes finally yielded this contention, receiving certain concessions which they deemed more valuable in lieu thereof. The patent certainly was not executed when signed by a governor or Principal Chief only, it being a joint deed. It would seem, however, that within the purview of the law, it was executed when signed by both the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation, there being no provision of law declaring that it should not become effective until it was approved by the Secretary of the Interior. This is material when it is desired to calculate the time when the land becomes alienable under the provisions of Section 16. Apparently by using the phrase "from date of patent," it was intended the actual date to be determined by an inspection of the patent itself. The date of a conveyance could not well be later than the date of the signature of the last grantor. If the desire had been to fix the period from which to calculate the running of the time of restrictions upon alienation from the date of delivery of the patent, or of its approval by the Secretary of the Interior, there would have been no difficulty in using language not susceptible of doubt. It is difficult, however, to see any reason why the term "from date of patent" should be changed by construction to read "from date of delivery," or from the date of approval by the Secretary of the Interior.

Date of patent, date of delivery and date of approval are distinct acts, having reference to different steps in the progress of completing the allottee's evidence of title. No good can be accomplished by an attempt to substitute one of these for the other, but much harm may result therefrom.

Section 33. Alienation of land selected in name of ancestor under Section 22 of the supplemental agreement.

By section 22 of the Supplemental Agreement it is provided as follows:

"If any person whose name appears upon the rolls prepared as herein provided, shall have died subsequent to the ratification of this agreement, and before receiving his allotment of land, the lands to which said person would have been entitled if living, shall be allotted in his name, and shall, together with his proportionate share of other tribal property descend to his heirs according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas.

"Provided: That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act readily when appointed, or if, in either case, such selection be not made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands to be thus allotted."

Does this section create an entirely different and distinct class of allottees from those provided for in sections above referred to? Under the provisions of the treaty of 1866, upon the death of a member, his interest in the land reverted to the tribe at large, and did not descend to his heirs.

Under the laws of the Nations as administered in their courts, ownership of improvements upon Indian lands and distinct from the ownership of the lands, was recognized. Upon the death of the owner of such improvements, they descend as personal property, and in the lifetime of such owner were subject to removal or disposition at his instance.

Inasmuch as the interest of the individual in the land itself reverted to the tribe upon his death, Section 22, in reserving to the heirs of such deceased member his interest in the lands of the tribes, created a new right. It gave to the heirs of such member as died subsequent to the 25th day of September, 1902, the date of the final ratification of the treaty with the tribes, the land that would have been allotted to such member if he had been alive. No restriction whatever is placed upon alienation, by the heirs, of the land allotted *in the name* of the ancestor, nor is there any such connection between this section and sections 15 and 16 as would indicate that it was intended that the re-

strictions contained in those sections should control in alienating lands allotted under section 22.

The subject of allotment of lands to the living members of the tribe had been exhausted, and other subjects proceeded with before it occurred to the treaty-makers that it was desirable to make provisions for the allotment of land to those who died subsequent to the ratification of the treaty, but before they had actually received an allotment. The reason for placing restrictions upon the sale of allotted lands does not exist as to inherited lands. The members of the tribes have, in the lands allotted to them, a permanent home and a sufficient amount of land to support themselves and their families, without the addition of such lands as they may inherit. Section 22 presents a different class from those mentioned in either Section 12, 13 or 16, and the lands thus allotted in the name of the deceased member are alienable by his heirs immediately upon allotment.

It is true that this specific provision has never been passed upon by a court of last resort. The State trial courts, so far as the writer knows, have uniformly sustained this construction of the statute, and the trend of the higher courts' decisions is in the same direction. It is proper, however, to note that the Attorney-General of the United States is assailing conveyances made by heirs of lands allotted under this section, in so far as the surplus is concerned, on the ground that the lands so conveyed are not alienable.

In the case of *Griggs et al. v. McClain et al.*, 23 Pac. 1045, a Kansas case, it was held that Congress by making the law of descent and distribution of the State of Kansas applicable to certain Indian estates thereby removed the restrictions upon alienation by the heirs of such deceased Indian. Might it not well be said that land, to descend in accordance with a given statute under which there is no restriction upon alienation, would descend free from restrictions unless there was somewhere in the act a positive imposition of restrictions upon alienation?

There are many provisions of the treaty, or agreement, applicable to allottees who have had land allotted to them that are not applicable to the persons who inherit lands allotted in the name of a deceased ancestor. For instance, the provision, with reference to the selection of an allotment for such enrolled member, is that the same shall be made by a duly appointed administrator or executor; and if such administrator or executor

fails to act readily, the Commission to the Five Civilized Tribes may make the selection.

There is no provision for the designation of a homestead. It cannot be said that any part of the land inherited as provided in Section 22 of the Supplemental Agreement is intended to be occupied as a homestead or held as a surplus allotment. This inherited land, on the death of the enrolled member who had not received an allotment, descends as provided in the Arkansas Statute to his heirs, whoever they may be. There may be one or a dozen heirs. All or none of them may be members of the tribe. They may belong to any nationality, or speak any language, and may consist of one or a dozen heads of families, or minor children. The land may pass to the heirs so that some of them may own an undivided one-tenth, one-fourth, one-half, or any other fractional part. No reason can be given for attaching the homestead character to lands which may thus descend to heirs. Nor is there any reason for the contention that the restrictions which the agreement applies to the allottees of surplus lands allotted to living members of the tribe should be extended so as to include heirs who inherit lands allotted in the name of a deceased member of the tribe.

The heirs are not allottees as to this character of land, but may be citizens of the United States, and not members of the tribe. The fact that the Dawes Commission may have divided the inherited lands into homesteads and lands in excess of homesteads is not persuasive of the fact that it was intended that they should be so divided. The Commission had fallen into the habit of so dividing other allotments, and perhaps for this reason divided the allotments selected in the name of a deceased member into a homestead and surplus allotment.

The penal provisions of Sections 19, 20, and 21, against the holding of other lands than those allotted to living members and Freedmen could not in the nature of things have reference to inherited lands or lands acquired otherwise than by selection in or for allotment.

The estate created and controlled by virtue of Section 22 never vested in the deceased member of the Tribe, for the reason that he died "before receiving his allotment," and while the land was tribal or public land. By operation of the treaty, the title passed directly from the tribe to the heirs, and they are far

removed from any provision in the treaty imposing restrictions upon alienation.

The Arkansas Descent and Distribution Statute, is the vehicle by which the agreement transmitted the title directly to the heirs, and these statutes contain no restrictions upon alienation. It must not be over looked in considering the subject of the right to alienate lands inherited under this statute that the estate created thereby is a new one, and that, apparently, Section 22 is the only provision of the agreement that in any manner affects or controls the selection and inheritance of lands allotted in the name of a deceased member. *Hancock et al. v. Mutual Trust Co.*, Supreme Court of Okla., not yet reported.

Section 33a. Alienation of inherited lands; Act of May 27, 1902, not applicable.

Under the provisions contained in the Indian Appropriation Act, approved May 27, 1902 (32 Stat. at L. 275; Kappler's Laws and Treaties, vol. 1, 120), the adult heirs of any deceased Indian to whom a trust patent had been issued were permitted to alienate the lands inherited by them. Minor heirs were also permitted to convey through a duly appointed guardian and under authority of the proper courts. In each instance, however, before the conveyance became effective, it was required to be approved by the Secretary of the Interior. The execution of the conveyance as provided and the approval by the Secretary of the Interior operated to pass the full title to such inherited lands to the grantee named in such conveyance. The only proceeding necessary to make a conveyance under this Act valid, is the approval of the Secretary of the Interior, so far as the adult heir is concerned, and a proper sale through the court and approval of the Secretary of the Interior so far as the minor heir is concerned.

After the passage of this Act, the Secretary of the Interior was requested to approve a deed to lands inherited from an allottee of one of the Five Civilized Tribes. He declined to do so, his declination being based upon the assumption that said Act did not apply to the heirs of allottees of the Five Civilized Tribes; that Congress had legislated specially with reference to each of the Five Civilized Tribes; that the legislation in each case covered the entire subject of allotment and alienation of allotted and inherited lands; that the general provisions would not be permitted to override or control the special provisions

enacted with reference to each of the several tribes. This construction was so well founded that it has ever since been accepted as the proper construction of this Act and has been acquiesced in to such an extent that it constitutes a rule of property. Since that time and up to April 26, 1906, conveyances have been made by the heirs of the allottees of the Five Civilized Tribes where restrictions upon alienation have been removed, without the approval of the Secretary of the Interior. On that date and by the terms of section 22 of the Act of April 26, 1906 (34 Stat. at L., 137), Congress enacted a somewhat similar provision with reference to full-blood heirs and minors. The provisions, however, did not extend to adult heirs of less than full blood. As to them, the death of the ancestor removed all restrictions and inherited lands became immediately alienable. This, of course, did not relieve or discharge the homestead provisions in certain of the agreements reserved for the benefit of certain minor members of the family of the deceased ancestor.

Section 34. Alienation, inherited freedmen lands.

Section 13 of the Supplemental Agreement, above referred to, is as follows:

“The allotment of each Choctaw and Chickasaw Freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment.”

The language is almost identical with that relating to the homestead of a member of the tribe. The restriction is for the lifetime of the allottee only and the entire allotment, therefore, becomes alienable immediately upon his death.

There was contained in Section 3 of Act of April 26, 1906, the following provision:

“Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered ‘homesteads,’ and shall be subject to all provisions of this or any other Act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes.”

This provision did not affect the status of the allotments of freedmen allottees, nor did it diminish the authority of the heir to alienate, nor did the lands of freedmen allottees become alienable by such allottee until May 27, 1908.

Section 35. Alienation for townsite purposes under Act of March 3, 1903.

Before considering the Act of May 27, 1908, reference will be made to certain Acts removing restrictions in a limited way. The Indian Appropriation bill of March 3, 1903, contained the following proviso:

“And provided further, that nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the line of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior.” (32 U. S. Statutes at L., 982.)

Under rules and regulations prescribed by the Secretary of the Interior, the Commission made an investigation of the application of the Indian to alienate his land for townsite purposes, and if they believed it to be for his best interest to do so, they permitted a deed to be executed and the money to be paid in their presence, after having secured authority from the Secretary to approve the sale and thereupon they approved the deed. There can be no question about the validity of the title to the land thus alienated.

Section 36. Act of April 21, 1904; removing restrictions upon alienation.

By the Act of April 21, 1904 (33 U. S. Statutes at L., 189) it was provided:

“And all of the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian Agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.”

Under the first paragraph of this section, the surplus allotments of all allottees who were members of either of the tribes, otherwise than by blood, and who were not minors, became immediately alienable.

Under what may be considered the second paragraph of the above, a special department has been created in the office of the Indian Agent for the purpose of investigating and determining what members of said tribes by blood are competent to handle their own affairs and should be given the privilege of alienating their surplus lands. The Indian Agent in his own proper person, or through a subordinate, investigates the application of an Indian allottee for the removal of restrictions upon the alienation of his surplus land, and reports to the Secretary of the Interior his finding with a recommendation as to whether the application should be granted. If the Secretary of the Interior is of the opinion that the petition should be granted, he endorses upon the recommendation of the Indian agent "approved" and causes the same to be recorded in his own office and returned to the United States Indian Agent. The Indian Agent causes the certificate of removal of restrictions to be recorded in the office of the Commission to the Five Civilized Tribes, and delivers the same to the allottee.

In February, 1905, the Secretary promulgated rules and regulations by the terms of which, when he had endorsed his approval upon an order removing restrictions, the same should not become effective for thirty days; in other words, the endorsement was "approved, effective thirty days from date hereof." The right of the Secretary to thus restrain the alienation under an order removing restrictions has been challenged. The statute, however, expressly provides that the Secretary shall remove these restrictions under such rules and regulations as he may prescribe. "Such rules and regulations as he may prescribe" within the purview of this statute have the force of law and it is believed that there is no good reason why the Secretary cannot attach this condition to his approval. *United States v. Thurston County*, 143 Fed. 287; *Zeverly v. Weimer*, 82 S. W. 949; *Adams v. Freeman*, 50 Pac. 135; *Kaha v. United States*, 38 L. Ed. 415.

Section 37. Act of April 21, 1904; removing restrictions upon alienation—Continued.

There has been serious contention made that, notwithstanding the removal of restrictions upon alienation either by virtue of the provisions of law removing same upon the right to alienate by those who are not of Indian blood or where by Act of the Secretary under permission granted to remove restrictions upon the alienation of surplus lands of Indians by blood, that such lands do not become alienable nor would inherited lands become alienable until patent issues. With reference to the members of the tribe who are not citizens by blood, the provision of the law is that "all restrictions upon the alienation of the lands of all allottees of either of the Five Civilized Tribes who are not of Indian blood, except minors, are, except as to homesteads hereby removed." It is the restriction upon the alienation by the allottee that is removed. The Act is not that the restrictions shall be removed when patents are issued, but that the restrictions are "hereby removed." The word "allottee" has been uniformly construed to mean a person who has selected and has set apart to him the land he desires to take in allotment. A patentee is a person to whom a patent has been issued. They are entirely different and distinct classes. A patentee usually must be an allottee, while an allottee does not become a patentee until he receives his patent. The certificate of allotment is issued as of date of filing, and is made conclusive evidence of allottee's right to the land. For any court or tribunal to hold that this statute which says that the restrictions upon the alienation of the lands of certain allottees are "hereby removed" does not become effective until the patent is issued, is to fly in the face of the statute, and to incorporate into the legislation language not used and evidently never contemplated by Congress. *DeGraffenreid v. The Iowa Land & Trust Co.*, 95-Pac. 624; *Godfrey v. Iowa Land & Trust Co.*, 95 Pac. 792; *Western Investment Co. v. Tiger*, 96 Pac. 602; *Jones v. Mehan*, 175 U. S. 1; *Quinney v. Denny*, 18 Wis. 485; *Ruggles v. Marsilliott*, 19 Wis. 173; *United States v. Winona, etc., R. Co.*, 67 Fed. 948; *James v. The Germania Iron Co.*, 107 Fed. 597; *Clark v. Lord*, 20 Kan. 390; *Doyle v. Wilson*, 20 Minn. 308; *Doe v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black 356; *Best v. Pope*, 18 Wall 112; *New York Indians v. United States*, 170 U. S. 1; *Stark v. Starr*,

94 U. S. 477; *Lamb v. Davenport*, 18 Wall. 307; *Elwood v. Flannigan*, 104 U. S. 562; *Langdeau v. Hanes*, 21 Wall. 521; *Ryan v. Carter*, 93 U. S. 78.

Section 38. Act of May 27, 1908, removing restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

On the 27th day of May, 1908, the president approved a bill entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," which is very comprehensive, and sought to cover the entire subject of the alienation of lands allotted to members of the Five Civilized Tribes. The first provision contained in the bill upon this subject is as follows:

"That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act."

This provision became effective July 27, 1908.

Section 39. Intermarried citizens.

The first paragraph of the bill is "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions." Prior to this time the intermarried citizen could not alienate or incumber his homestead. This provision removes all restrictions, and leaves him as free to deal with his entire allotment as any other citizen is to deal with land acquired in the ordinary way.

Section 40. Freedmen.

Under this provision those persons enrolled as freedmen may alienate their entire allotment wholly free from any restrictions of any character. Prior to this act it is not believed that a freedman of the Choctaw and Chickasaw Nation could alienate any part of his allotment. It was originally contemplated that it should be treated as a Choctaw or Chickasaw homestead and subsequently it was especially provided that it should be so considered.

The freedmen of the tribes other than the Choctaw and Chickasaws were accorded the rights of citizenship and enrolled as citizens, but upon a separate roll showing that they were freedmen or descendants of freedmen. Under the Act of April 21, 1904, the members of such tribes other than the Choctaws and Chickasaws, who were enrolled on the freedman roll as citizens and who were not of Indian blood, were permitted to alienate their surplus allotments. Their status was substantially the same as that of intermarried citizens. Prior to the Act of April 26, 1906, making the rolls conclusive evidence of the quantum of Indian blood, it was a matter of some difficulty to determine who of the freedmen were not of Indian blood. Many freedmen were of Indian blood by descent from one only of their parents. Some of the attorneys took the position that where the party's name appeared upon the freedmen roll, that was sufficient evidence of the fact that such member was not of Indian blood; others, as a precaution, before purchasing, took an affidavit from the party who was on the freedmen roll, that he was not of Indian blood. In the earlier days some few pursued the same course with reference to intermarried citizens, requiring

from them an affidavit that they were not of Indian blood, before they would purchase. A number of persons were residing in the various tribes claiming citizenship by blood. Some of these persons intermarried with recognized and enrolled members of the tribe. This made it unnecessary for them to prosecute their claim to citizenship by virtue of their Indian blood. Of course, so far as the rolls are concerned, they are not of Indian blood, although they may possibly be of Indian descent. So far as the intermarried citizens are concerned, it is not thought that it would be at all tenable to assail a conveyance made by one of them upon the theory that he was an Indian by blood notwithstanding the conveyance was made prior to the Act of April 26, 1906.

Section 41. Mixed blood Indians, having less than half Indian blood.

Prior to the passage of this act no mixed blood Indian of either of the Five Civilized Tribes could alienate or encumber his homestead nor any part thereof. In certain instances where the necessary time had elapsed from the date of the certificate, the date of patent, or the approval of the agreement, as the case may have been, he could alienate certain parts or all of his surplus lands. The treaties differed, but in no event was there any general power of alienation of the surplus lands prior to this time.

Section 42. Minors.

In no act previous to this had the restrictions upon the alienation of any part of the lands allotted to minors been removed. The minor was, so far as the provisions of the treaties and laws applying to him directly were concerned, in the same position as other members of the tribe whose restrictions had not been removed. Under the time limit contained in the treaties the positive inhibitions against alienation expired according to the terms of such treaties respectively, and he was then left subject to the disabilities of a minor, and his property could be sold only upon such conditions and terms and for such reasons as the property of other minors not members of the Indian tribes might be sold.

To express it differently, the laws of the State with reference to the sales of the property of minors, applied to the property of minor allottees of the various tribes after the restrictions upon

alienation were removed. Prior to November 16, 1907, where restrictions had been removed by death and the inherited lands were therefore alienable, they could be sold in accordance with the laws of Arkansas in force in the Indian Territory applicable to the sale of real estate of minors; and subsequent to November 16, 1907, in accordance with the laws of Oklahoma applicable to the sale of real estate of minors. This a clear and explicit removal of all restrictions upon alienation of lands of minors to which the same is applicable.

The Supreme Court of the State of Oklahoma in the case of *C. D. Wortham, Curator, Plaintiff in Error v. Robert John, et al., Defendants in Error*, has recently held "That the appointment of a curator for a minor without the voluntary appearance of his mother, his father being dead, was void, and that in such a case the court is without jurisdiction to settle the accounts of the curator.

The same court has also recently declared in the case of *S. R. Tolbert, Guardian, v. Morgan Bolin et al.*, 98 Pac. 934, that

"A general guardian of the estate of a minor is entitled to the exclusive possession, together with the care and management of the estate of such minor committed to his trust, which cannot be limited by order of court as to its custody, and where, on annual settlement the court found the amount due said minor and ordered the same paid by said guardian to the clerk of the court, that part of said order to make such payment is void."

These decisions are both in construction of the Arkansas Statute in force in the Indian Territory before Statehood, but are of very great interest in connection with sales made by guardians of minors under the Oklahoma Statute.

Section 43. Minors; conveyances by.

The Supreme Court of the State of Oklahoma in the recent case of *International Land Co. v. Joseph Marshall*, 98 Pac. 951, not yet reported, held that a minor cannot recover his allotment without refunding the purchase price where he had induced the purchaser to buy upon the representation that he had arrived at his majority.

This case is of much importance, because it has frequently happened that Indian minors have made affidavit as to their age in order to induce a purchaser to buy their land, and then either instituted suit themselves to recover possession of the land with-

out refunding the purchase price or any part thereof, or sold to a third party who instituted such suit.

This case is based upon the reasoning that the action of the minor in inducing the purchase is a tort, and that the minor being responsible for his torts, the purchaser must be placed *in statu quo* before he is entitled to recover. *Blakemore v. Johnson*, 103 Pac. 554.

Section 44. Minors. When they arrive at majority for the purpose of conveying real estate.

By the provisions of Section 2 of this act, exclusive jurisdiction is conferred upon the probate courts of the State of Oklahoma over all of the estates of all minors, and it is specifically declared that the term minor or minors shall include all males under the age of twenty-one years and all females under the age of eighteen years. Under the provisions of the Oklahoma statute with reference to minors marriage terminates minority, so far as the right to convey real estate is concerned. It is believed, however, that so far as members of the tribes are concerned and in dealing with their lands that they do not arrive at their majority notwithstanding they may have married until they arrive at the ages of twenty-one and eighteen years for males and females respectively. Therefore in the management, leasing and sale of the lands of the minor allottees of the Five Civilized Tribes, the statutes of Oklahoma prevail, with the single exception of the age when minority terminates. In cases where restrictions upon alienation have been removed as to land of minors, whether as to that allotted to them or as to that inherited by them, the same may be sold as lands of other minors are sold by the proper county court of the State in the exercise of its probate jurisdiction. (Since the above was written the Oklahoma Legislature has amended the Statute so as to permit a married minor to sell before majority only such lands as he may have acquired after marriage. See sec. 205.)

Section 45. Indians of more than half and less than three-quarter blood, right to alienate.

Where the allottee is more than half and less than three-quarter Indian blood under this provision all restrictions are removed upon the alienation all lands except his homestead. This is perhaps the smallest class affected by the terms of the act. It is clear and explicit and needs no explanation.

Section 46. Removal of restrictions by Secretary under Act of May 27, 1898.

Under this paragraph all homesteads of allottees enrolled

and mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all lands allotted to enrolled full-bloods and enrolled mixed-bloods of three-quarter or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other incumbrances prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. Under this provision in no event can any of the classes mentioned alienate their lands without the express permission of the Secretary of the Interior.

Pursuant to this provision the Secretary of the Interior on the 20th day of June, 1908, promulgated regulations for the removal of restrictions upon the

“Homesteads of adult mixed-blood allottees having half or more than half and less than three-quarters Indian blood.

“All allotted lands of adult mixed-blood of three-quarters or more Indian blood.

“All allotted lands of adult full-blood allottees.”

These regulations provide for a personal investigation by a representative of the department under rules and regulations prescribed for that purpose, which may result in either a conditional or unconditional removal of restrictions. The first eighteen sections of the rules and regulations are confined to provisions for making of leases.

Section 19 to 29, inclusive, deal directly with the subject of alienation of lands under the Act and are printed as a part of Part II hereof. But see section 49 as to the validity of law extending restrictions.

Section 47. Effect of Act of April 26, 1906, on right to alienate inherited lands.

On April 26, 1906, President approved an Act entitled “An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.” Section 22 of that Act reads as follows:

“That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her

share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by the proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

This statute remained in force from the 26th day of April, 1906, until the 27th day of July 1908 when it was superseded by a new statute covering the same subject. It therefore affects all conveyances that were made between the 26th day of April, 1906, and the 27th day of July, 1908. It relieved whatever uncertainty, if any, there was with reference to when inherited lands became alienable under the provisions of Sections 12, 13, 14, 15 and 16 of the Supplemental Agreement. In the case of a minor heir where sale was made of the homestead part of the ancestral estate by order of the probate court of the Southern District of the Indian Territory, the Secretary of the Interior declined to approve the conveyance insisting that the purpose of this act was not to add restrictions and that the homestead part of the allotment descended free of restrictions and only the approval of the court was necessary to pass a good title. Subsequently, a different view was taken of the matter with reference to the surplus inherited lands. This statute has not been construed by any court of last resort, but a somewhat similar statute so far as authority conferred upon the Secretary of the Interior is concerned, with reference to leasing has been construed by the Court of Appeals of the Eighth Circuit. *Morrison v. Burnett*, 154 Fed. 617.

That part of section 22, however, which provides that "the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made or to whom a patent or deed has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the land inherited from such decedent . . ." relieves what-

ever uncertainty existed as to whether lands allotted to members of the tribes became alienable immediately upon their death, or whether the restrictions continued to exist and run against conveyances made by the heirs as well as by the allottee.

This Act clearly authorizes conveyance by adult heirs, of less than full-blood, of lands selected by the ancestor in his lifetime without any restrictions of any character whatsoever. The same is true in reference to sales of lands of minors who are less than full-blood. Such sales are permitted upon order of court and are valid without the approval of the Secretary of the Interior. These provisions are applicable not only to the Choctaws and Chickasaws, but to the Cherokee, Creek and Seminoles.

The provision making conveyances by full blood heirs subject to approval by the Secretary of the Interior, if construed as applicable to conveyances by heirs of lands which descended free from restrictions upon alienation is possibly subject to constitutional objection as imposing such restriction upon alienation as to amount to a taking of the properties affected thereby without due process of law.

It would be if so construed the imposition in another form of a character of restrictions similar to that imposed by section nineteen, and while apparently less objectionable than such provision, yet if the Secretary refuse to approve the bar is as effective as that imposed by section nineteen.

Section 48. Right to alienate as affected by provision of Section 9 of Act of May 27, 1908.

Section 9 of the Act is as follows:

“That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee’s land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906,

the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided further*, That the provisions of section 23 of the act of April 26, 1906, as amended by this act, are hereby made applicable to all wills executed under this section."

The first provision of the section above quoted provides that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's lands, but there are two limitations upon this provision. The first is contained in the first proviso thereto and is that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the said deceased allottee. This provision is reasonably clear. It simply contemplates that the full blood shall have the protection of an investigation by the county court of the county in which the administration on the estate of the deceased is pending. It contemplates that such county court shall take such action as will result in the Indian receiving fair compensation for the property sold. The second proviso is that "if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof for the use and support of such issue during their life or lives until April 26, 1931." . . . This proviso seems to be free from doubt except as to the character of the estate thus taken by the minor. Is it a fee simple or a life estate? The language is "for the use and support of such issue during their life or lives until April 26, 1931." The language used for the "use of during their life or lives" would indicate that it was intended to confer only a life estate upon such minor and that the entire estate would be-

come alienable April 26, 1931. However, the Supreme Court of the State construed a somewhat similar provision in the Creek Agreement as passing fee simple title. See *Lynde-Bowman-Darby Co. v. Jonas Brown*, 97 Pac. 613.

In the Creek Agreement the provision is that the homestead of each citizen shall remain after the death of the allottee for the use and support of children born to him after May 25, 1901, and does not expressly limit the time of the holding of said estate to the life of the allottee. The presumption that a life estate only is passed by this provision is strengthened by the language used in the remainder of the proviso which is as follows: "But if no such issue survive then such an allottee if an adult, may dispose of his homestead by will free from all restrictions. If this be not done or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs according to the laws of descent and distribution of the state of Oklahoma free from all restrictions." When to the language of the above there is added the provision "or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall descend to the heirs according to the laws of descent and distribution of the State of Oklahoma free from all restrictions;" the first provision being "during their life or lives" but not longer than until April 26, 1931, and the last terminating the interest and providing for a descent in case of death prior to that time under the Oklahoma statute of descent and distribution, seems to contemplate a life estate. It is true, however, that no provision is made for the descent if the child die on or after April 26, 1931, but its interest having expired under the provisions of the law at that time the estate would properly descend in the absence of any special provision to the heirs of the deceased parent.

CHAPTER VII.

EXTENSION OF RESTRICTIONS UPON ALIENATION.

Section 49. Extension of restrictions upon alienation; validity of.

Section 19 of the Act of April 26, 1906, contains the following provision:

“That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribe shall have power to alienate, sell, dispose of, or encumber in any manner, any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress.”

This provision is of very doubtful constitutionality. These Indians were all citizens of the United States, with all the “rights, privileges and immunities” of other citizens of the United States. One of the privileges was to dispose of his own property as he saw fit, subject only to existing restrictions upon alienation. Is it within the power of Congress to say to an Indian who is a citizen of the United States that under the law “you can now sell your land in one year from this date; we will impose upon you and your property and inhibition against its sale for a period of twenty-four years longer.” Certainly such an imposition upon the liberty to contract of any other citizen of the United States would be held unconstitutional and void without a moment’s hesitation. It would also be held to be such a destruction of the liberty to contract and such a limitation upon his right to dispose of his property as would be within the prohibition of the Fifth Amendment to the Constitution of the United States. The effect of this statute making Indians citizens of the United States was under consideration by the Supreme Court of the United States in the case of *In Re Heff*, 197 U. S. 488. The contention of the Solicitor General with reference to the effect of this Act is couched in the following language:

“If these Indians are citizens at all, they are not citizens of full competence, just as minors are citizens and subject to rights

and duties as such, but are not *sui juris* in respect of age, and other classes of citizens under personal or legal disabilities are not *sui juris* in other respects."

It is true that this question involved the question of a sale of liquor to an Indian and not a property right, but the language used by Judge Brewer is so terse, so clear and free from doubt, and so applicable to this question that attention is called to the following quotation from the opinion:

"But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore State citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound. . . .

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the State, and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indians are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

In construing this same Act, in the case of *Ex Parte Viles*, 139 Fed. 68, the court referring to the decision in the Heff case, uses the following language:

"I understand the decision of the Supreme Court in the Heff case as a broad declaration of a fundamental principle—that Congress has no power by special legislation to classify citizen, so as to create race or other distinctions, and

subject one class or grade of citizens to police regulations not applicable to all citizens and incompatible with the reserved power of the States to enact and enforce valid local laws, and that when an individual has once acquired the rights and privileges of a citizen, and become subject to state laws, his status cannot be changed by an Act of Congress without his individual consent and the concurrent assent of the State in which he resides."

The Choctaw and Chickasaw tribes never assented to the extension of these restrictions nor did the individual members of the tribe.

Discussing a like subject, the court, in *Bird v. Terry*, 129 Fed. 472, uses the following language:

"He (the Indian) is a citizen of the United States, and entitled, equally with other citizens, to make a lawful use of his own property, and to prosecute and defend in the courts of this State and in the courts of the United States actions affecting his legal rights with respect to leases of the land in question for terms not exceeding two years. Having a complete vested estate in the land and being endowed with the rights of citizenship, George Bird is under the protection of the guaranties of the Constitution of the United States, so that neither Congress nor the executive branch of the government can divest him of his property, nor deny him the equal protection of the laws in a manner which would violate the constitutional rights of any other citizen, . . . nor be subjected to the control of government functionaries in the matter of leasing his lands for a term not exceeding the time limit specified in his patent."

It can hardly be questioned that the interference with the property of a full blood Indian by prohibiting him from conveying it for twenty-five years beyond the time when the law permitted him to convey it is such an interference with his property as to amount to a "taking" without due process of law. Provision has been made for testing the constitutionality of this Act and suit has been instituted in the Court of Claims for that purpose, styled *Wm. Brown and Levi B. Gritts v. United States*, but the case has not yet been decided. If this statute applied to an ordinary citizen of the United States to whom the government felt it owed no special duty, it would in all probability be unhesitatingly declared unconstitutional, but the disposition on the part of the Federal courts to protect what they believe to be the best interest of the Indians may lead them to find some means, if possible, by which the constitutionality of this Act may be sustained.

The Court of Claims has since the above was written sustained the constitutionality of this Act in the test case and an appeal has been taken from the judgment of the Court of Claims to the Supreme Court of the United States.

Section 50. Extension of restrictions upon alienation; validity of—Continued.

The validity of the provisions of this Act extending restrictions upon alienation is perhaps the most important question affecting the residents of that part of the State of Oklahoma which formerly consisted of the Five Civilized Tribes. The right to extend restrictions involves not only the validity of the present Act, but the authority of Congress in the future and at its will to impose such additional restrictions as in its judgment may be necessary for the protection of certain citizens of the United States who were formerly members of the Five Civilized Tribes.

On the 3rd day of March, 1893, the President approved an Act creating what is known as the Dawes Commission, with authority to negotiate with the Five Civilized Tribes for the allotment in severalty of their lands to the members of the Tribes respectively. Section 15 of said Act is as follows:

“The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment, the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.” (27 Stat. at L., 645.)

It will be observed that the Act provides that “upon such allotment, the individuals to whom the same may be allotted shall be deemed to be in *all respects* citizens of the United States.” The word “all” is evidently inserted for some purpose. It is not that such allottee shall be deemed in *some* respects a citizen of the United States and shall have in *some* respects the rights of a citizen of the United States, but it is that he “shall be deemed to be in *all* respects a citizen of the United States.”

On March 3, 1901 (31 Stat. at L., 1447) the President approved an Act amending section 6 of the Act of February 8, 1887 (24 Stat. at L., p. 388) and which as amended, reads as follows:

“.....And every Indian in the Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all of the rights, privileges and immunities of such citizens whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.”

It may be well assumed, therefore, that in view of the language used, both in the Act of 1893 and in the Act of 1901, *supra*, that it was not intended to confer qualified citizenship upon members of the Five Civilized Tribes, but to confer full and complete citizenship discharging all the rights possessed by the government of the United States to act as guardian over the persons of members of the Five Civilized Tribes. With this dissolution of the guardianship over the person, it necessarily followed that the government lost its guardianship over the individual property of the allottee. The relation of the United States to the lands of the Five Civilized Tribes is wholly different from its relation to those of ordinary tribal Indians. Each of the Five Civilized Tribes held their lands by patent from the government of the United States, conveying a title in fee simple, the possibility of a reversion only existing in favor of the United States. The United States is not the grantor in the conveyances made to the allottees of the Five Civilized Tribes. In making the allotment agreement, it consented to the vesting in the allottees of a fee simple title, freed from all possibility of reversion. Not only this, but in the Act of 1893 (27 Stat. at L., 645) in order to induce the members of the Five Civilized Tribes to allot their lands in severalty, the government assured each of said tribes, by public statute enacted to that end, that “upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.”

The government's authority to further control the right of members of the Five Civilized Tribes in alienating the lands allotted to them cannot be based upon any property right in the lands existing in the United States; nor can its efforts to enforce restrictions upon alienation be sustained upon the theory that it has any right or interest in the lands of the allottees of the Five Civilized Tribes.

Restrictions upon alienation of lands allotted to members of the Five Civilized Tribes are not creatures of the law in the ordinary sense. They are the result of an agreement between the members of the Tribes and the United States. Each member of the tribe agreed to an allotment in severalty of the lands of the tribes and to accept as his pro-rata share of allottable lands a given number of acres of a given value as determined by appraisement of the Commission to the Five Civilized Tribes. By contract, the burden imposed upon his right to alienate was fixed upon consideration of his acceptance in severalty of his pro-rata share of the tribal lands, and the release of his claim to the remainder of the lands allotted to other members of the Tribe. The individual allottee complied with the obligation assumed by or imposed upon him in this agreement and selected his allotment and received his certificate and perhaps his patent therefor. He did this under an express agreement with the United States. May the United States, which has guaranteed him all the rights, privileges and immunities of citizenship and that, upon the selection of his allotment, the reversionary interest of the United States should pass to such allottee and has agreed that the restrictions upon his right to alienate the land thus allotted shall be for so long and no longer, extend such restrictions so as to destroy the right of the allottee to alienate or otherwise dispose of his allotment for the period of twenty-five years?

The Court of Claims in the case of *Wm. Brown and Levi Gritts v. United States* assumed that the existence of the tribal governments afforded sufficient authority for the extension by Congress of the restrictions upon the right to alienate of allottees of the Five Civilized Tribes. Government is the ligament that holds the political society together and when it is destroyed, the society as a political body is destroyed; it is the public political authority, which gives and directs the body politic or society of men called a state, held together to promote their safety and advantage by means of their union. *Thompson v. Taylor*, 42 Miss. 651 (Affirmed, 22 Wall. 479).

In *People v. Pierce*, 41 N. Y. Supp, 858, government is declared to be the exercise of authority in the administration of the affairs of a State, community or society. The authoritative direction and restraint exercised over the actions of men in communities, societies and States.

In *Winspear v. Holman*, 37 Iowa 544, it is said that in a political sense, government signifies that form of fundamental rules by which the members of a body politic regulate their social actions and the administration of public affairs according to established constitutions, usages and laws.

What is the character of the tribal governments as they have existed since the 4th day of March, 1906? The tribal governments for many years prior to making the agreements for the allotment of lands in severalty had exercised substantially the same functions exercised by State governments. The governmental authority consisted of a Governor or principal chief, a Legislature consisting of two branches, a judiciary consisting of superior and inferior courts. They also had a code of laws controlling marriage, divorce, descent of property, contractual relations, defining and punishing crimes and offenses against the Nation, providing for the maintenance of public schools, the collection and disbursement of public revenues, the protection in general of the lives and property of the members of the Tribes. What were the tribal governments that were continued in force by the joint resolution of March 2, 1906 (34 Stat. at L., p. 822), and section 28 of the Act of April 26, 1906 (34 Stat. at L., p. 137)? The courts of each of the Five Civilized Tribes had been abolished and Congress had declared that no law of either of the Five Civilized Tribes should ever be enforced at law or in equity in a court of the United States; the right to legislate had been destroyed; the right to enforce existing laws had ceased, because the courts had been abolished. The tribal governments were relegated to mere rolls of the members of the Tribes. No member of the Tribes owed any duty or obligation to this extended tribal government; it afforded no protection to either the life or property of the member; it in no sense answers to the definition of "government."

The purpose of the extension of these tribal governments was not to continue the governmental powers and authority, because that authority had already been destroyed; the members of the Tribes had been absolved from their allegiance to the Tribal governments, and had become citizens of the United States. The Tribal chiefs and governors were continued in office for the purpose of passing title only, and the Tribal governments were continued to avoid the possibility of the M., K. & T. Railway Company grant attaching. Many years before 1906, the govern-

ment had made a grant of certain lands to the State of Kansas for the benefit of a certain railway company, to become effective when the Indians should cease to occupy such lands and the same should revert to the United States and become public lands thereof.

On the 1st day of March, 1906, the Senate became frightened at the suggestion that if the Tribal governments were permitted to expire, the railway grant might become effective. To prevent the possibility of such a happening, a joint resolution was introduced and passed extending these Tribal governments. These governments have not since the 4th day of March, 1906, exercised any governmental authority whatever over those who were formerly members of the Five Civilized Tribes. These Tribal governments could in no proper sense of the word speak or act for the former members of the Five Civilized Tribes. The governor or principal chief may execute deeds to allottees and to lots in cities and towns. If he fails to do so, he can be removed and someone else substituted who will do so. It may be safely asserted, therefore, that the tribal governments have ceased to exist for all governmental purposes and exist only nominally and for the purposes mentioned. Such a tribal government would have no authority to consent for its former members to the extension of restrictions upon alienation, nor would a majority of the tribe have a right to consent to imposing such a burden upon the allotments of those formerly members of the tribe who objected to the same. Obligations may not be imposed upon all the property in a community simply because a majority of the members are in favor of imposing the same. If obligations may be imposed by a vote of the people, it must be for a governmental purpose and pursuant to some resolution or valid legislative provision, connected with the exercise of a governmental function.

The authority to extend restrictions upon alienation of lands allotted to members of an Indian tribe was under consideration by the Supreme Court of the United States in the case of *Wiggan v. Conolly*, 163 U. S. 56. It is there contended that the members of the Ottawa tribe of Indians having taken their land in severalty had become citizens of the United States, that the tribal government had been dissolved, and there was no government which had the right to consent to an extension of

restriction upon alienation, or authority to impose additional restrictions.

The authority to extend restriction was sustained, and based upon the right of the tribal government to bind the members of the tribe, it having first been held that the tribal government had not ceased to exist when the agreement extending restrictions upon alienation was entered into. Mr. Justice Brewer speaking for the court uses the following language:

“This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add with the consent of the tribe a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.”

It will be observed that the extension of restrictions complained of affected only those who were minors.

Some additional light is thrown upon this subject by the concluding paragraph of the opinion of the Supreme Court of the United States, in the case of *Jones v. Meehan*, 175 U. S. page 32, as follows:

“The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. *Wilson v. Wall*, 6 Wall. 83, 89; *Reichart v. Felps*, 6 Wall. 160. *Smith v. Stevens*, 10 Wall. 321, 327; *Holden v. Joy*, 17 Wall. 211, 247.”

CHAPTER VIII.

AGE AND QUANTUM OF INDIAN BLOOD.

Section 51. Effect of provisions of Act of April 26, 1906, and May 27, 1908, making final rolls conclusive evidence of quantum of Indian blood and age.

Section 3 of Act May 27, 1908, provides "that the rolls of citizenship and of freedmen of the Five Civilized Tribes, approved by the Secretary of the Interior, shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, and of no other persons, to determine questions arising under this Act and the enrollment records of the Commission to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizens or freedmen."

Section 19 of the Act of April 26, 1906, declares: "and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior" Some doubt has arisen as to the authority of Congress to make these rolls conclusive evidence of the quantum of Indian blood and of the age of the person whose name appears thereon. It is very difficult if not entirely impossible to tell with absolute accuracy either the age or the quantum of Indian blood of the great majority of the members of the Five Civilized Tribes. Few records of births were kept and no records of the quantum of Indian blood. Any law which permitted alienation based upon the quantum of Indian blood and fixed no means of definitely determining such quantum would open the door to unlimited uncertainty and litigation. There being restrictions upon the alienation of these lands Congress could remove them upon such terms and conditions as it saw fit. Certainly the person purchasing land would have no interest in the matter and no right to complain of such an act as he could in no event have rights to be prejudiced thereby. The member of the tribe having no right to alienate except upon the terms permitted thereby could hardly accept such terms, alienate in accordance therewith, and then complain of the pro-

visions of an act of Congress made for his benefit, the privilege therein conferred to be exercised at his option, when he had exercised the option. As a usual rule the information from which these rolls with reference both to the quantum of Indian blood and the age of the allottee were made up was that given by the party himself or in the case of a minor by his father and mother who would ordinarily be supposed to be better informed both as to his age and quantum of Indian blood than would any other person. It would seem, therefore, that this provision of the law would not come under condemnation as would an ordinary act which prescribed that certain evidence should be treated as conclusive of a given fact. This act may be more properly construed as making the rolls the basis for the removal of restrictions rather than making them conclusive evidence upon the subject of the quantum of Indian blood and the age of the allottee. A fixed standard of this character can do no injury to anyone, and will prevent innumerable lawsuits.

Does the provision in the Act of May 27, 1908 "and the enrollment records of the Commission to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizens or Freedmen" apply only to those citizens or Freedmen who are permitted to alienate under the provisions of said Act, or does it apply in all cases arising subsequent thereto where the age of a citizen or Freedman is involved? If it be given a construction which makes it applicable to those persons who at the time held their lands free from restrictions upon alienation, it would perhaps be subject to constitutional objection as invading the province of the courts. (See Section 207).

CHAPTER IX.

VOID CONVEYANCES.

Section 52. Conveyances before allotment not valid.

In quite a number of instances intermarried citizens and freedmen have either conveyed, or contracted to convey their lands when selected in allotment, prior to the time of their actual selection and the courts have been called upon to construe and determine the validity of such contracts. Most generally these have been contracts providing for the payment of attorneys fees in a given sum to secure the enrollment of the party making the contract, accompanied by a deed then actually executed conveying in general terms the surplus allotment, or by an agreement to thereafter execute deed when the land had been selected in allotment. Usually these contracts were made when the citizenship of the party making the same was denied and when such party was not the owner of the improvements upon or in the possession of any tribal lands holding the same for the purpose of allotment.

The provisions of the Act of April 21, 1904, removing restrictions under which most of these contracts were made, is as follows:

“And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may with the approval of the Secretary of the Interior be removed.”

It is the restrictions upon the alienation of lands of *allottees* that is removed. The word “allot” means to set apart a thing to a person as his share. Anderson Law Dictionary, p. 51; 2 Cyc. 134.

Section 11 of the Supplemental Agreement is as follows:

“There shall be allotted to each member of the Choctaw and Chickasaw Tribes as soon as practical after the approval of the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the

average allotable land of the Choctaw and Chickasaw nations . . . conforming as near as may be to the areas and boundaries of the Government survey, which lands may be selected by each allottee so as to include all his improvements."

It cannot well be urged that a member of the tribe becomes an allottee, until he selects his allotment. Prior to that time he is not an allottee; subsequent to that time he is as to the land set apart to him an allottee. Prior to that time, the land so far as he is concerned is the public land of the tribe. *Ligon v. Johnson*, 164 Fed. 670; *Cherokee Nation v. Stephens*, 174 U. S. 485. His right to select an allotment is merely the common tribal right in the public lands of the two Nations and, is not subject to alienation. *Ligon v. Johnson*, 164 Fed. 670; *Denton v. Capitol Townsite Co.*, 82 S. W. 853; *Turner et al. v. Gilliland*, 76 S. W. 253; *Hockett v. Alston*, 58 S. W. 675; *Case v. Hall*, 46 S. W. 180; *Sayer v. Brown*, 104 S. W. 877; *Kelley v. Harper*, 104 S. W. 829; *Rodgers v. Hill*, 64 S. W. 536; *Lewis v. Clements*, 95 Pac. 769; *Dukes v. Goodall*, 82 S. W. 702; *Hicks v. Coleman*, 25 Cal. 125; *Goodall v. Jackson*, 20 Johns. (N. Y.) 693; *United States v. Lewis*, 76 S. W. 299, 22 Cyc. 127; *Hale v. Wilder*, 8 Kan. 545; *United States v. Kagama*, 118 U. S. 375; *Buttz v. Northern Pacific Ry. Co.*, 119 U. S. 55; *Mann v. Wilson*, 23 How. 457.

A very recent case in discussing the various efforts made to evade the effect of laws imposing restrictions upon alienation, is that of *Goodrum v. Buffalo*, 167 Fed. 817.

In this case Judge Phillips, who wrote the opinion for the Court uses the following language in concluding the same:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible concocted by any person can avail to divest the Indians of their title to allotted lands within the period of limitation prescribed by Congress."

The condemnation visited by the court upon attempts to evade or destroy the effect of statutes imposing restrictions upon alienation, will appeal to the conscience and judgment of all. There are, however, certain parts of the opinion which promulgate an extremely dangerous doctrine. These parts are clearly *dictum*, and do not discuss, decide or determine any question actually involved in the case.

The parts of the opinion referred to as dangerous, are those which destroy the effect of a judgment as *res adjudicata*. Un-

der the dictum contained in this opinion, if the trial court in a subsequent cause, where the same issues are involved should conclude that in rendering the judgment offered in evidence the court so rendering the same had misconstrued some statute, that for such reason the effect of the judgment as *res adjudicata* might be disregarded.

This seems to be the effect of the following expression found in the opinion:

“The Congress representing the sovereignty of the nation, created the estate, affixing to it the quality of inalienability for the period of 25 years. Without the creator’s consent the grantee was without the power to convey. Where and how did the territorial court acquire such jurisdictional power? The court itself was but the creature of Congress. It was not invested with the power to confer upon this Indian authority to convey away her allotted lands which the sovereign government creating the estate and the court, declares shall not be done for twenty-five years after allotment.”

Judge Phillips was of the opinion that the restrictions referred to in the Act of Congress under consideration, ran with the land for a period of twenty-five years. The United States Court rendering the first judgment, was of the opinion that the restrictions were personal and expired upon the death of the allottee.

If Judge Phillips is right and the trial court in the original cause was wrong, this would not under the practically unanimous decision of all the courts, affect the validity of the first judgment.

To hold that a particular judgment is rendered void because certain statutory jurisdictional conditions have not been complied with in submitting the case, is an entirely different proposition from ruling that the effect of a judgment in a case in which the court has jurisdiction, loses its force as *res adjudicata*, simply because of some erroneous view of the judge rendering the first judgment. It is confidently asserted that authority cannot be found to sustain the contention that the validity of a judgment may be denied or its force and effect limited, merely because in the trial of the cause, or in the rendition of the judgment, improper evidence was admitted, or erroneous conclusions of law arrived at.

The jurisdiction of a court is in no wise dependent upon whether or not a correct decision is arrived at. If the court has jurisdiction to decide the case correctly, it has jurisdiction to decide it incorrectly. Jurisdiction properly acquired cannot be divested by an erroneous construction of the statute. If the jurisdiction of a court depended upon the construction of a statute and the court should erroneously decide it had jurisdiction under a given statute, when under a proper construction it would not have such jurisdiction, then there might arise a case for the application of a rule analogous to the rule declared by Judge Phillips. But if the error of the court arises not in determining its jurisdiction, but in the exercise of a jurisdiction which it properly has, the rule can have no application.

In so far as this opinion indicates that the effect of a judgment as *res adjudicata* may be thus destroyed it is against the great weight of authority.

Section 53. Conveyances before allotment not valid—Continued.

It is claimed under the authority of *Jones v. Meehan* (175 U. S. 1) and cases there cited, that the Indian, being a citizen of the United States, with all the rights and privileges of such, has the right to convey his surplus before allotment if he is not an Indian by blood. This contention overlooks the provision in the act removing restrictions, limiting it to allottees, and is based upon the assumption that the removal of restrictions is effective from April 21, 1904, regardless of whether the person has become an allottee or not. It also overlooks the general laws with reference to the prohibition of the sale of tribal lands or an interest therein and particularly Section 2118 of the Revised Statutes of the United States. If the mere right to allot lands were salable or assignable, perhaps but few members of the tribe would ever actually become allottees. The prohibition against alienation does not depend upon the character of the tribal title; and all contracts impinging upon the provisions of the statute prohibiting alienation are absolutely void. *Goodrum v. Buffalo*, 162 Fed. 817; 18th Opinion of the Attorney-General, 235; 9th Opinion of the Attorney General, 24; *Cherokee Strip Live Stock Association v. Cass Land, etc., Co.*, 138 Mo. 394; *Mayer v. Cherokee Strip Land Stock Association*, 58 Kan. 712.

Section 54. Conveyance or encumbrance before removal of restrictions void.

Section 15 of the Supplemental Agreement above referred to reads:

"The lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt or obligation of any character contracted prior to the time that said land may be alienated under this Act, nor shall said lands be sold except as herein provided for."

The purpose of this section is to prevent the Indian or freedman, prior to the time he can alienate his allotment, entering into a contract obligating himself to alienate when restrictions upon alienation are removed. It is claimed that in a great many instances contracts for the conveyance of Indian lands were entered into before the lands became alienable, obligating the Indian to convey when the restrictions upon alienation were removed. It can be readily seen that if such an arrangement could be successfully carried out, the restrictions upon alienation of land imposed for the benefit of the Indian would be worse than useless. The courts have held under this section that a conveyance made before the removal of restrictions, or an agreement made before, to become effective after the removal of restrictions, is absolutely void and incapable of enforcement under any circumstances. *Lewis v. Clements*, 95 Pac. 769; *Sayer v. Brown*, 104 S. W. 771; *Harris v. Hartridge*, 104 S. W. 826; *Kelley v. Harper*, 104 S. W. 829; *Turner v. Gilliland*, 76 S. W. 253; *Denton v. Capitol Townsite Co.*, 82 S. W. 853; *Goodwin v. Buffalo*, 162 Fed. 817.

Section 55. Conveyance or incumbrance in violation of statute declared void.

Section 5 of the Act of May 27, 1908, contains the following provision:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

Congress was not content with the ordinary presumption of law that a contract entered into or a conveyance made in violation of a positive statute was therefore void. For the purpose of putting contracts made before the removal of restrictions or before the time at which the party could alienate entirely beyond the pale of the law, this section was enacted declaring such contracts "absolutely null and void."

Under the proviso quoted in the last mentioned section the provisions in the various agreements prohibiting the enforced alienation of lands of the allottees of the tribe to satisfy any debt, demand or obligation, existing prior to the removal of the restrictions, is emphasized. The provision at the conclusion of the proviso, "other than contracts heretofore expressly permitted by law," evidently applies only to specific instances where the Indian has by special act of Congress or authority of the Secretary of the Interior been permitted to make such contracts or create such incumbrances.

The proviso of Section 19 of the Act of April 26, 1906, contains the following:

"....And every deed before or after the making of which a contract or agreement was entered into before the removal of restrictions be, and the same is hereby declared void."

This act operates prospectively only; it could not destroy a conveyance valid at the time it was made. Under the statute existing at the time of the passage of the Act of April 26, 1906, a conveyance before the removal of restrictions was void, but it is probable that a conveyance entered into after the removal of restrictions, pursuant to an understanding had before, would not be held invalid unless the two transactions were so linked together as to constitute in fact but one transaction.

Section 55a. Conveyance of land in adverse possession void.

Sections 2025-2027 of the Statutes of the Territory of Oklahoma, 1893 (Wilson's Statutes 1903, 2111 to 2113) extended over the State of Oklahoma, are as follows:

“(2025) Every person who takes any conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in the possession thereof, while such lands or tenements are the subject of controversy, by suit in any court, knowing the pendency of such suit, and that the grantor was not in possession of such lands or tenements, is guilty of a misdemeanor.

“(2026) Every person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor.

“(2027) The two last sections shall not be construed to prevent any person having a just title to lands, upon which there shall be an adverse possession, from executing a mortgage upon such lands.”

These statutes possess much interest in their application to the condition of affairs existing in that part of the State of Oklahoma which formerly constituted the Indian Territory. Some few persons have adopted the course of harassing the owners of land, who acquired the same from Indian allottees, by taking subsequent conveyances for the purpose of clouding the previously acquired title. It sometimes happens that they find an Indian who is willing to make any character of contention about the circumstances under which he made the original conveyance. The parties engaged in this character of business are usually supplied with suggestions for the Indian to base a contention upon. These statutes were under consideration by the Supreme Court of Oklahoma in the case of *Huston v. Scott*, 94 Pac. 512. After a careful consideration of the statutes and subsequent laws enacted with reference to the same subject, it was determined that the above provisions had not been repealed but that they were in full force and effect in the State of Oklahoma. The conclusions of the court upon the subject are clearly set forth in the second paragraph of the syllabus:

“A conveyance of land made in contravention of the provisions of Section 2026 St. Okla. 1893, by the rightful owner is utterly void as against the person holding adversely claiming to be the rightful owner thereof under color of title, but as between the parties and all the rest of the world it is good, and passes the grantor's title.”

There is cited in support of this conclusion the following cases: *Ruemmeli v. Cravens*, 13 Okla. 343, 74 Pac. 908; *Livingston v. Proseus*, 2 Hill (N. Y.) 526; *Farnum v. Peterson*, 111 Mass. 148; *Wade v. Lindsey*, 6 Metc. (Mass.) 407; *Cleveland v. Flass*, 4 Cush. (Mass.) 76; *McMahan v. Howe*, 114 Mass. 140, 19 Am. Rep. 321; *John Doe ex dem. Dearmond v. Roe*, 37 Ga. 5; *Den et al. v. Geiger*, 9 N. J. Law 225; *Steepel et ux. v. Downing et al.*, 60 Ind. 478; *Whittaker v. Cone*, 2 Johns. Cas. (N. Y.) 57; *Pepper v. Haight et al.*, 20 Cas. (N. Y.) 57; *Thompson v. Richards*, 19 Ga. 594; *Everenden et al. v. Beaumont et al.*, 7 Mass. 76; *Brinley v. Whiting*, 5 Pick. (Mass.) 347; *Sweet et al. v. Poor et al.*, 11 Mass. 549; Sutherland on Statutory Const., 336.

CHAPTER X.

DECLARATIVE LEGISLATION AND THE DOCTRINE OF RELATION.

Section 56. Effect of curative or declarative provision of Act of April 26, 1906.

In the case of the homestead of a deceased allottee where the restrictions upon the alienation are for lifetime of the allottee only, the contention that the lands do not become alienable until the patent is issued would add to the statute an indefinite and uncertain extension of the restrictions upon alienation. To meet all possible contention of this character, the following proviso was inserted in section 19 of the Act of April 26, 1906:

“And provided further that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided.”

It was contended that this statute sought to make effective conveyances that were ineffectual prior to that time. It is believed that this is a valid curative statute, if indeed there was any defect to be cured. It gives to the contract the force and effect it was intended to be given by the parties. It does not destroy a vested right, because it may not be said that a man has a vested right to repudiate his obligation because of a technicality. The rule with regard to curative statutes is that if the objection to the validity of the instrument or that which deprives it of validity, was such that it might have been dispensed with, or obviated by a previous statute, it may be done by subsequent legislation. This statute falls within the rule. *Sutherland on Statutory Construction*, sec. 483, *Johnson v. Richardson*, 44 Ark. 372; *Cupp v. Welch*, 50 Ark. 294; *Satterly v. Matthewson*, 2 Pet. 380; *Randall v. Kreiger*, 23 Wall. 137; *Watson v. Mercer*, 8 Pet. 88; *Ewell v. Daggs*, 108 U. S. 143; *Cross v. U. S.*

Mortgage Co., 108 U. S. 477; *Kerney v. Taylor*, 15 How. 494; *Leland v. Wilkinson*, 6 Pet. 317; *McFadden v. Evans-Snyder-Buel Co.*, 185 U. S. 505.

Section 57. Effect of curative or declarative provision of Act of April 26, 1906—Continued.

The Supreme Court of the State of Oklahoma in the case of *Frame v. Bivens* in discussing this provision of the statute reaches the conclusion that it is a declarative and not a curative statute. This opinion has not yet been published and the following quotation from the same will be of much interest to the profession generally.

"We will, therefore, take judicial notice that the construction we have placed upon these statutes was from the time of their enactment the popular one; that relying upon such construction vast landed interests have changed hands, oil and gas fields and cities and towns have sprung up on property the title to which is based upon the assumption that the Act of April 21, 1904, removed all restrictions, including the restrictions prohibiting the incumbering of surplus allotments of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors; that investments have been made and securities taken upon the strength of that assumption; that doubt has arisen and suits have been brought based upon the construction contended for by plaintiffs in error, and that congress has been invoked to speak by declaratory statute the intent and true construction of the statutes just construed.

"Cooley's Constitutional Limitation (Second Edition), 134, says:

"'A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been. Such a statute, therefore, is always in a certain sense retrospective, because it assumes to determine what the law was before it was passed, . . . a declaratory statute is important only in those cases where doubts have already arisen, . . .'

"This Congress did by passing an Act approved April 26, 1906, declaring in effect, what the law was before it was passed and the true construction to be as we have announced. The Statute is as follows:

"'Provided, further, that conveyances heretofore made by members of any of the five civilized tribes subsequent to the selection of the allotment and subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because such convey-

ances were made prior to the issuance and recording of delivery of patent or deed; and this shall not be held or construed as affecting the validity or invalidity of any such conveyance except as hereinbefore provided, and every deed executed before or for the making of which a contract or agreement was entered into before the removal of the restriction be and the same is hereby declared void.'

"In passing this Act Congress undoubtedly recognized the fact that the intent and meaning of the statute under construction had led to much controversy and in certain instances were being misconstrued; that certain conveyances of surplus allotments had been made, the validity of which was in question because made subsequent to the selection of allotment, subsequent to the removal of restrictions but prior to patent issued, as in this case. We think, then, the intention of this Act was to, and it did declare, that such conveyances 'shall not be deemed or held invalid solely because said conveyances were made prior to issuance of patent . . . ' and was intended to put an end to such controversies. Hence, although plaintiffs in error contend that the mortgage in question is void because it was an incumbrance on the surplus lands of Mulkey made before patent issued, this Act flatly declares that it shall not be held void for that reason.

"This Act to our mind clearly indicates that Congress intended that the words 'all restrictions upon the alienation of lands' contained in the Act of April 21, 1904, when construed with Sections 15 and 16 of the Act of July 1, 1902, should also include and remove restrictions on incumbrances and was so intended in the first instance, and we shall so hold. The Act in effect declared that the court by misconstruction should not hold void that which was valid."

Section 57a. Passing of legal title.

Section 5 of the Act of April 26, 1906, 34 Stat. 137 is as follows:

"That the patents or deeds to allottees in any of the five Civilized Tribes to be hereafter issued shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed become effective, the title to the lands described therein shall inure and invest in his heirs; and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his lifetime. And all patents heretofore issued where the allottee died before the same became effective, shall be given like effect; and all patents or deeds and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the

Five Civilized Tribes, and when so recorded shall convey legal title and shall be delivered under instructions of the Secretary of the Interior to the party entitled to receive the same. . . .”

Although this language is sufficiently broad to cover the recording, in the office of the Commissioner to the Five Civilized Tribes, of all conveyances in any wise affecting the title to lands allotted to the members of the Five Civilized Tribes, Congress no doubt intended to require only the recording of patents or deeds to allottees of land selected in allotment or other instruments in writing issued by the United States or the Tribes, operating as a conveyance or as evidence of title or right to alienate. It certainly was not contemplated that conveyances executed by allottees, or other persons claiming under allottees, should be so recorded.

This statute was perhaps rendered necessary by the fact that many allottees had died prior to the issuance of patent. This being true, there was no one in existence to whom the full legal title could pass. This difficulty could be cured, so far as past transactions were concerned, only by legislation. The provision was made broad enough to cover future, as well as past transactions, thereby eliminating like uncertainties in the future. There is a further reason for this provision in the statute, and that is, it was frequently difficult to locate an allottee and deliver the patent. The purpose of this Act was to fix the date of the passing of the full legal title as of the date of recording, instead of the date of execution or delivery of the deed. It clearly recognizes the validity of conveyances made before the issuance of patent, inasmuch as it provides that if a member of the tribe shall die after restrictions upon alienation have been removed “his property shall descend to his heirs or his lawful assigns.” No stronger legislative recognition of the right to convey before patent could be desired. It is a declaration in another form of the rule that if a grantor is not possessed of the full legal title when he makes a conveyance that when he does acquire such title, it passes immediately to his grantee.

Section 58. Section 642 of Mansfield's Digest and the doctrine of relation.

Section 642 of Mansfield's Digest was in force in the Indian Territory during the period from May 2, 1890, until November 16, 1907, and was as follows:

“If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee and such conveyance shall be valid, as if such legal or equitable estate had been in the grantor at the time of the conveyance.”

This is but a re-affirmation of the common law rule. Under this statute if the Indian allottee was not the owner of the legal title to his allotment at the time he conveyed the same, there being no restrictions upon alienation and he being capable to contract with reference thereto immediately upon the passage of the title to him it vests in his vendee. *Jones, Adm., v. Green, Administrator*, 41 Ark. 363; *Kline v. Ragland*, 47 Ark. 117; *Steeple v. Downing*, 60 Ind. 478; *Clark v. Hall*, 19 Mich. 356; *Fisher v. Halleck*, 15 N. W. 552; *Douglass v. McCoy*, 5 Ohio 522; *Bernardz v. Colonial Land Co.*, 98 N. W. 166; *Baldwin v. Root*, 40 S. W. 3; *Barr v. Gratz*, 4 Law Ed. 553; *Bush v. Marshall*, 12 Law Ed. 440; *French v. Spencer*, 16 Law Ed. 97; *Mann v. Wilson*, 16 Law Ed. 584; *Massey v. Papin*, 16 Law Ed. 734; *Elwood v. Flannigan*, 26 Law Ed. 842; *Stanway v. Rubbio*, 51 Cal. 41; *Nicodemus v. Young*, 67 N. W. 906; *Johnson v. Newman*, 43 Tex. 628; *Morrison v. Faulkner*, 21 S. W. 984; *Spice v. Newberg*, 37 N. W. 417; 19 Century Digest, col. 2024, sec. 92; 41 Century Digest, col. 468-9, sec. 315-16. *Dunn v. Barnum*, 51 Fed. 355; *Jenkins v. Collard*, 36 Law Ed. 812.

CHAPTER XI.

DESCENT.

Section 59. Descent under Section 22; supplemental agreement.

It is provided by Section 22 of the Supplemental Agreement that lands allotted in the names of the deceased members of the tribes shall descend according to the laws of descent and distribution as found in Mansfield's Digest of the statutes of Arkansas of 1884, Chapter 49. There is no provision whatever made in either of the treaties or by law of the United States for the descent and distribution of property allotted to a member of the tribe who dies subsequent to the selection of his allotment. In the absence of such provision or any other law relating to the matter, these lands would have descended according to the laws of descent and distribution of the Choctaw and Chickasaw Nations, according to the location of the land, provided the Choctaw and Chickasaw Nations had laws of descent and distribution.

At the time of the enactment of these statutes there was no such thing as descent and distribution of real estate in either of the nations, but there is no reason upon the face of the Choctaw and Chickasaw statutes why they might not apply to and control the descent of real property when the members of the Tribe became the owners of an inheritable interest in real estate. *DeGraffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624.

Section 60. Descent prior to April 28, 1904.

On June 7, 1897, Congress enacted a law abolishing the Indian courts and making the laws of the United States applicable to persons and property of the members of all the Five Civilized Tribes, to become effective January 1, 1898. On the 23rd day of April, 1897, the commissioners on behalf of the United States and the Choctaw and Chickasaw Nations entered into an agreement heretofore described as the Atoka Agreement, which became a law as section 29 of what is commonly called the Curtis Bill (Act of June 28, 1898). Section 26 of the Curtis Bill provides "that on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Sec. 29, paragraph one of said Atoka Agreement, contained the following provision:

“And if said agreement as amended be so ratified, the provisions of this Act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this Act. . . .”

Does the provision that “the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory” prevent those courts and their successors, the courts of the State of Oklahoma, from giving force and effect to the laws of descent and distribution of these Indian tribes, which were in force among the members of the tribes themselves from the beginning of the allotment of the tribal lands to the 28th day of April, 1904? If it has such effect, is it in conflict with any part of the Atoka Agreement so as to render it nugatory under the provision that said Act should “only apply to said tribes where the same do not conflict with the provisions of said agreement.” The Court of Appeals for Indian Territory never definitely decided that the adoption of the Atoka Agreement rendered ineffectual Section 26 of the Curtis Bill, and in dealing with questions arising under the Indian laws it ignored the existence of section 26 to such an extent that it may be well concluded that it considered that section repealed. Adopting what appears to be the uniform trend of the courts on this subject, the Choctaw and Chickasaw laws of descent and distribution control in the descent of property of members of the tribe with the exception of land “allotted in the name of a deceased member of the tribe” in all cases where the allottee died prior to the 28th day of April, 1904. *Crowell v. Young*, 69 S. W. 829; *Engleman v. Cable*, 69 S. W. 895; *George v. Robb*, 64 S. W. 615; *Nivens v. Nivens*, 64 S. W. 604, 76 S. W. 114; *Hannon v. Taylor*, 45 Pac. 51; *O'Brien v. Bugbee*, 26 Pac. 428; *Jones v. Mehan*, 175 U. S. 1; *Ricknor v. Clabber*, 76 S. W. 271; *Hayes v. Barringer*, 104 S. W. 937; *In Re Guardianship of Maggie May Poff*, 103 S. W. 765.

Section 61. Descent subsequent to April 28, 1904.

On the 28th day of April, 1904, the President approved an Act of Congress entitled “An Act to provide for additional

judges in the Indian Territory, and for other purposes," which is in part as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indians, freedmen or otherwise."

The statutes of descent and distribution of Arkansas thus put in force and made applicable to the estates of all persons residing in the Indian Territory are published in connection herewith as a chapter of Part II hereof, as is also that part of the chapter on dower affecting the descent of real property. These chapters are both annotated, showing the construction placed upon the same by the Supreme Court of Arkansas prior to their adoption in the Indian Territory. There are some peculiarities of these statutes to which it is considered desirable to call attention. Under this statute of descent and distribution there are two well marked lines of descent, one of the ancestral estate and the other of new acquisitions. The ancestral estate is the estate of inheritance under the common law enlarged so as to include a gift, grant or devise made by either of the parents. In such a case the estate descends to the children and their descendants. In the absence of children or their descendants, it ascends to those of the blood through whom the estate came, to the exclusion of those of the blood of the other parent. The new acquisition is substantially the estate by purchase of the common law, limited by having carved out of the same, estates by gift, grant or devise from the parents or either of them. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants ascends to the father for his lifetime, then to the mother, and then to the collateral kindred, the father's family being given preference only over that of the mother's family. *Kelly's Heirs v. McGuire*, 15 Ark. 555; *West v. Williams*, 15 Ark. 682; *Beard et al. v. Moseley*, 30 Ark. 417; *Shulthus v. McDougal*, 162 Fed. 331; see also authorities cited under next section.

Frequently abstracts have come under the supervision of the writer where the attorneys have overlooked the fact that in

estates of inheritance, in the absence of descendants, the property goes exclusively to the heirs of the deceased who are of the blood of the ancestor from whom the estate came. In no event does an ancestral estate ascend to anyone who is not of the blood of the ancestor through whom the estate came.

Section 62. Descent—whether an ancestral estate or a new acquisition.

Are the lands of the allottees of the Choctaws and Chickasaws upon their death ancestral or a new acquisition under the Arkansas statute of descent and distribution?

This is a most important question, because the heirs who take if the estate is ancestral are different from those who take if the estate is a new acquisition. It has been held both by the Circuit Court of Appeals for the Eighth Circuit (*Ligon et al. v. Johnston et al.*, 164 Fed. 672) and the Supreme Court of the United States (*Stephens v. Cherokee Nation*, 174 U. S. 488) that the lands of the Choctaw and Chickasaw Nations are public lands "held in trust for the members of the tribes . . . only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people."

If the unconditional fee were in the members of the tribe and allotment meant only the partition of an estate, the estate received by the allottee would be ancestral. Such is not the case. The estate held by a member previous to allotment was a mere right of possession and could be alienated only to a member of the tribe. The estate received by the allottee is an absolute fee simple including the United States' possibility of reversion. The estate thus received by the allottee is unquestionably a much greater and more valuable one than his previous possessory right. He takes by deed or patent from the governor of the Chickasaw Nation and the principal chief of the Choctaw Nation, and not by inheritance. He takes without regard to whether his father and mother be living or dead.

It has been the practically unanimous opinion of lawyers residing in the Eastern District of Oklahoma concurred in by the writer that such an estate is a new acquisition. This opinion is based upon the decisions of the Supreme Court of Arkansas construing this statute prior to its adoption and the decisions of other courts construing like statutes.

Recently the Circuit Court of Appeals for the Eighth Circuit in affirming the judgment of the lower court in *Shulthis v. Mc-*

Dougal et al., 162 Fed. 331, held the estate of an allottee to be ancestral and not a new acquisition, holding that if the allottee's "father was the only parent through whom he derived his right, . . . to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally."

An appeal will probably be prosecuted from the judgment of the Circuit Court of Appeals to the Supreme Court of United States. Notwithstanding the great respect entertained for the judgment of that court, the matter will not be regarded as settled until determined by the Supreme Court of the United States. (*Kelly's Heirs v. McGuire*, 15 Ark. 555; *Scull v. Vaugine et al.*, 15 Ark. 695; *Magnus v. Arnold*, 31 Ark. 103; *Galloway v. Robinson*, 19 Ark. 396; *Hogan et al. v. Finley et ux.*, 11 S. W. 1035; *Wheelock v. Simons*, 86 S. W. 830; *West et al. v. Williams et al.*, 15 Ark. 682; *Higgins v. Higgins et al.*, 48 N. E. 943; *In Re Donahue*, 36 Cal. 329.)

Section 63. Descent; subsequent to November 16, 1907.

On the 16th day of November, 1907, the President issued his Proclamation admitting Oklahoma into the Sisterhood of States. By the terms of the Enabling Act and under the provisions of the Constitution, the laws of the Territory of Oklahoma that were not locally inapplicable, or in conflict with the Constitution, were extended over the State of Oklahoma. While Congress reserved in the Enabling Act the right to legislate with reference to the persons and property of the Indians in the Indian Territory, it also stipulated in the same Act that the laws of the Territory of Oklahoma should become effective throughout the State upon its admission into the Union. To this the Constitutional Convention and the people of the State acceded. Therefore, the law of descent of the State of Oklahoma, was by the joint Act of the Congress of the United States and the people of the State of Oklahoma, made the law of descent applicable to the descent of all the lands in the State.

The descent of property is a matter peculiarly within the jurisdiction of the State, and though it is probable that under the reservations in the Enabling Act Congress has power to legislate upon this subject, it has shown no disposition to do so, otherwise than to require in the Enabling Act the extension of the laws of the Territory of Oklahoma over the State of Oklahoma, and by the provisions of the Act of May 27, 1908..

The Oklahoma statute is more modern and less complicated than the Statute of Arkansas, and operates to transmit the property of a deceased person to those surviving, who, when all things are considered are most entitled to it.

It has been suggested that the law of descent in force in the Indian Territory with reference to certain particular Tribes of Indians were acts of Congress and were not disturbed or affected by the extension of the laws of the Territory of Oklahoma over the State of Oklahoma. For instance, there were certain limitations upon descent in the Acts of Congress relating to the Creeks and in the Agreement with the Seminoles. It is suggested that these are not presumed to have been repealed by the general provision of the Territorial statutes in conflict therewith, extended over the State of Oklahoma. It is believed that this contention is not tenable. Section 21 of the Enabling Act contains the following:

“ . . . And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout the state *except as modified or changed by this Act or by the constitution of the State* and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.”

This language is unequivocal. There are only two cases in which the laws of the Territory of Oklahoma are not applicable—one where modified or changed by the Enabling Act and the other where modified or changed by the constitution itself. Neither the Constitution nor the Enabling Act made any provision whatever for continuing any laws of descent and distribution anywhere within the State of Oklahoma, other than the laws of descent and distribution of the Territory of Oklahoma. There are also certain limitations upon descent in the Act of May 27, 1908, affecting the disposition of the homestead lands allotted to members of the Five Civilized Tribes. The limitations there imposed are for the purpose of preserving the homestead for the use of the heirs of the allottee born too late to secure an allotment.

CHAPTER XII.

DOWER AND CURTESY.

Section 64. Dower; to what estate it attaches.

Sections 2571 to 2605 of Mansfield's Digest, are published in full in Part II, Chapter 66, and are thoroughly annotated. There is no complication about this statute. Section 2571 provides that a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless same shall have been relinquished in legal form. Perhaps the most serious question in connection with the dower interest in Indian lands is whether or not the widow is entitled to be endowed out of the lands allotted in the name of the husband after his death and of which it could not be strictly said that he was seized of an estate of inheritance during the marriage. At least one trial court has sustained the contention that the widow is entitled to be so endowed. Notwithstanding this fact, the writer is of the opinion that prior to the selection of an allotment that a member of the tribe is not seized of such an estate of inheritance as would confer upon his widow the right of dower in lands selected in his name after his death. It is also probably true that there was no such right as dower in the estate of the husband of a member of the tribe until the 28th day of April, 1904. Under the law as laid down by the Circuit Court of Appeals for the Eighth Circuit in case of *Davison v. Gibson*, 56 Fed. 443, the marital rights of the husband and wife in and to the property of each other respectively was held to be determinable by the laws of the tribes and not by the laws of Arkansas in force in the Indian Territory. It was held, however, that in the absence of any proof as to what the law of the tribe was upon the subject, the law of the forum would be applied.

The right of a white woman who has intermarried with a member of the Choctaw or Chickasaw tribe of Indians to take dower in his estate upon his death has been the source of considerable controversy. Inasmuch, as the intermarried citizen is a member of the tribe, with all the rights, privileges and

immunities of such, it would seem that there never was any real reason for denying to the widow of a deceased Choctaw or Chickasaw the right of dower in her husband's estate, simply because she is a white woman possessing no Indian blood.

The Supreme Court of the State of Oklahoma has recently held in the case of *Hawkins v. Stephens*, 97 Pac. 567, that such white woman is entitled to dower in the estate of her deceased Indian husband.

By the admission of Oklahoma to statehood and the adoption of the Oklahoma statutes of Descent and Distribution, dower was abolished. Where the husband died before statehood and the wife's dower rights had thereby become fixed, they are of course not affected by the extension of the laws of the Territory of Oklahoma over the State of Oklahoma.

The result of the extension of this statute was to repeal the Arkansas statute on dower. What was the effect of the repeal of the statute upon the inchoate rights of the wife, where the marriage had taken place or existed under the Arkansas law in force in the Indian Territory and the husband had acquired and held real estate at the time of the admission of the Indian Territory to statehood, as a part of the State of Oklahoma?

Section 65. Dower—inchoate; not a vested right.

In most of the earlier Arkansas cases dower is mentioned as a "vested" right. The later Arkansas cases, however, limit the meaning of the word "vested" thus used to such an extent as to deprive dower of all the attributes of a vested right, which would interfere with its modification or destruction by legislation.

In *Smith v. Howell*, 53 Ark. 239, 13 S. W. 921, the court states:

"The inchoate right of dower during the lifetime of the husband is not an estate in land, but a mere intangible, inchoate, contingent expectancy."

In *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497, the court uses the following language:

"Persons who may be entitled to inherit under existing laws may suffer detriment by changes in the law, that change the course of devolution; but there is no such a thing as a vested right in a prospective heirship, or in the maintenance of the laws of descent, and though their change disappoint reasonable expectations, it comes within no constitutional inhibition."

This court further states in *Hatcher v. Burford*, 29 S. W. 644, that:

“Those of our decisions which mention dower as a vested right, only use the term ‘vested’ in the sense of assuring whatever right the law gave, and not in the sense that dower could not be affected or changed by a change in the law itself.”

Dower is a form of inheritance prescribed by law. No good reason can be urged why the law affecting dower may not be changed, as can the law controlling the descent of property, from one line of heirs to another. The provision made for the widow under the Oklahoma laws is much more liberal than that made under the Arkansas laws and in any event it would be a change, not to the prejudice of the widow, but for her benefit. Under the Arkansas statute much formality was required in the relinquishment of dower. This affected, not only the form of the conveyance, the form and manner of taking acknowledgments, but limited the grantee to the one who held the legal title.

Section 66. Curtesy; prerequisite of.

Under the common law in force in Arkansas, on April 28, 1904, when all the laws of Arkansas were extended to and made applicable to the estates of all persons residing within the Indian Territory, including Indians and freedmen, the right of the husband to curtesy in the estate of his wife was recognized where all the common law conditions existed. These conditions are as declared by the Supreme Court of Arkansas to be: *First*, marriage; *second*, issue born alive; and *third*, actual seizin of an estate of inheritance by the wife during coverture. The only exception to the rule requiring actual seizin is where the estate is wild, uncultivated, and not in the adverse possession of any one else. It has not been authoritatively adjudged whether the right of curtesy exists in favor of the husband in and to the wife's allotment. Curtesy is a common law right, having its origin long prior to the fourth year of the reign of James I (1607).

It was a thoroughly established common law right at this time and was a part of the laws of Arkansas by virtue of the adoption of the common law by Chapter 20 of Mansfield's Digest. This chapter was extended over the Indian Territory by Act of May 2, 1890. On the 28th day of April, 1904, Congress extended “all the laws of Arkansas heretofore in force in Indian Territory” “so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise,

. . .” This would seem to directly apply the common law to persons and estates of Indians and freedmen and to confer the right of curtesy upon the Indian husband in his wife’s allotted lands. *McDaniel v. Grace*, 15 Ark. 465; *Harrod v. Meyers*, 21 Ark. 592; *Bagley v. Fletcher*, 44 Ark. 153; *Morris v. Edmunds*, 43 Ark. 427; *Milwee v. Milwee*, 44 Ark. 112; *Neelley v. Lancaster*, 47 Ark. 175; *Stanley v. Bonham*, 52 Ark. 354; *Littell v. Jones*, 56 Ark. 139; *Ogden v. Ogden*, 60 Ark. 70; *Boggy v. Roberts*, 48 Ark. 18; *Schulthis v. McDougal*, 162 Fed. 331, 12 Cyc. 1004; *Irving v. Diamond*, 100 Pac. 557.

Section 67. Curtesy not a vested right.

By the adoption of the constitution and the extension of the laws of the Territory of Oklahoma over the State of Oklahoma, the right of curtesy was abolished. What effect did this repeal have upon curtesy initiate where it existed at the time of the repeal? Did it fall with the repeal, or was the right such a vested one as to survive notwithstanding the repeal?

After the adoption of the constitution of 1874 the courts of the State of Arkansas uniformly held that the wife could convey her separate estate, either with or without the consent of her husband, and with or without his joining in the conveyance. It was further held, however, if the wife died without having disposed of her separate real estate that the husband’s right of curtesy attached, but where the right of curtesy existed, initiate or inchoate, at the time of the adoption of the constitution of 1874, which emancipated the married woman’s separate property, it was not affected thereby, and as to the property owned by the wife at the time of the adoption of the constitution, the right of curtesy existed and that the wife could not convey so as to destroy such right.

A distinction seems to be drawn between the curtesy rights of the husband, where he is entitled to the present enjoyment of his wife’s real estate, and in those cases where she is given the right of control and disposition of the same. In the first instance the right of curtesy being coupled with a present right of enjoyment, has usually been held to be a vested right and incapable of being destroyed by subsequent legislation. In the last-mentioned case the courts have generally, though not uniformly, held the right not to be a vested one, and therefore subject to repeal. *Erwin v. Puryear*, 50 Ark. 356, 7 S. W. 449, *Tiller & Taylor et al. v. McCoy*, 38 Ark. 91; *Shryock v. Cannon*, 39 Ark. 434; *McNear v. McNear*, 19 L. R. A., 256 and note, 15 Cyc. 1003.

CHAPTER XIII.

WILLS, LEASES AND MORTGAGES.

Section 68. Wills.

As to an estate that is alienable at the time of the death of the allottee there is no reason why such allottee may not dispose of the same by will as could any other citizen of the United States, but where there are restrictions upon alienation, it is believed that such restrictions deprive the allottee of power to dispose of his allotment by will. While there are some authorities that hold that a will is not an alienation, it is believed that the better line of authorities are to the effect that a disposition of property by will is an alienation thereof, and the Court of Appeals of the Indian Territory so held in construing this statute. See *Hayes v. Barringer*, 104 S. W. 937.

By section 23 of the Act of Congress of April 26, 1906, it is provided that:

“Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States court for the Indian Territory, or a United States commissioner.”

This provision seems to confer upon members of the tribes, other than Indians of full-blood, the right to dispose of their property by will, and of the full-blood Indians so to do subject to the provisions and the limitations therein contained. This provision of law continued in force until the Act of May 27, 1908, when it was materially modified by said Act. Section 9 of the Act of May 27, 1908 and its effect upon the right of Indians to make wills is discussed in Section 69.

Section 69. Wills under Act of May 27, 1908.

The last proviso of this section is that the provisions of section 23 of the Act of April 26, 1906, as amended by this act are hereby made applicable to all wills executed under this section. There is no direct amendment in this act of the provisions

of the act of April 26, 1906, other than the provisions of Section 8 of the act of May 27, which amends such section by adding at the end thereof "or a judge of a county court of the State of Oklahoma." The provision when so amended would read as follows:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*: That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner, or a judge of a county court of the State of Oklahoma."

There is a limitation upon the right conferred in Section 3 of the Act of April 26, 1906, in the second proviso of Section 9. That limitation is that "if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior." Therefore, Section 23 of the Act of April 26th may be considered as amended by the addition of a proviso in the following language: "Provided that no member of either of the Five Civilized Tribes of more than half Indian blood shall be permitted to dispose of his homestead by will where he shall leave surviving him a child or children born since March 4, 1906." This would also enlarge the restrictions contained in the provisions of the Cherokee and Creek agreement upon the subject of reserving the homestead for the benefit of minors born after the closing of the rolls of those tribes respectively.

Section 70. Leases.

It is provided in the Atoka Agreement that all contracts looking to the sale or incumbrance in any way of the land of an allottee except the sale therein provided, shall be null and void. No allottee can lease his allotment or any portion thereof for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing setting out specifically the terms thereof or which is not recorded in the clerk's office of the United States court for the district in which

the land is located within three months after its execution, shall be void and the purchaser or lessees shall acquire no right whatever by an entry or holding thereunder, and no such lease nor any sale shall be valid as against the allottee unless providing for him a reasonable compensation for the land sold or leased.

No further legislation was had upon this subject until March 3, 1905, when there was placed in the appropriation bill a provision that the Secretary of the Interior should cause to be investigated leases of allotted lands in the Indian Territory which he had reason to believe had been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and to report such facts to the attorney general who was authorized to institute suit in a proper United States court to cancel the same, and authorizing the cancellation of any lease obtained by fraud, or in violation of any of the tribal agreements, upon such terms and conditions as equity may prescribe, or to modify and continue the same upon agreement of all parties. There was contained the following proviso, however:

“No lease made by any administrator, executor, guardian or curator, which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General: *Provided, further*, no lease made by an administrator, executor, guardian or curator, shall be valid or enforceable without the approval of the court having jurisdiction of the proceeding.”

But few suits were instituted under these provisions and very few if any of them resulted in judgment in favor of plaintiffs. Demurrers were sustained in most of the cases upon the ground that the United States had no such interest in the matters as would authorize them to institute suit on behalf of the Indians. It is not believed that appeals were prosecuted in any of these cases and therefore there has been no judgment of an appellate court construing this statute.

This continued to be the condition of the law with reference to leases in the Choctaw and Chickasaw Nations until the Act of April 26, 1906; Section 19 of said Act contains the following proviso to the provision extending the restrictions upon alienation:

“Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations.”

Section 20 of the same Act also contains the following provision:

“That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, that allotments of minors and incompetents may be rented or leased under order of the proper court: Provided, further, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.”

There was no further legislation upon the subject of leases by allottees of the Choctaw and Chickasaw Tribes until the approval of the Act of Congress of May 27, 1908, containing general provisions in reference to leasing applicable to all of the Five Civilized Tribes.

Section 71. Leases—Continued.

The Supreme Court of the State of Oklahoma has recently rendered three opinions involving the question of whether or not the removal of restrictions upon alienation by the Act of April 21, 1904, removed the restrictions upon the right to lease. The court reached the conclusion that a lease is a species of alienation and that the removal of all restrictions upon the right to alienate removed the restrictions upon the right to lease. While the courts have not been uniform in their conclusions upon the question of whether or not a lease constitutes an alienation, perhaps this decision represents the weight of authority upon the subject. However, its result will be felt in its limitation upon the right to lease. Wherever there is a positive inhibition

against alienation and no satisfactory provision for leasing, this will perhaps destroy the right to lease which has been frequently exercised upon the assumption that it is not an alienation. *Williams et al. v. Williams* (98 Pac. 909); *Joins v. Robison*, 76 S. W. 107; *U. S. v. Lewis*, 76 S. W. 298; *Fraer v. Washington*, 69 S. W. 835.

Section 72. Leases; as affected by Act of May 27, 1908.

Section 2 of said act provides:

“That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor, or incompetent, for a period not to exceed five years, without the privilege of renewal; *Provided*, That leases of restricted lands for oil, gas or other mining purposes and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior and not otherwise.”

To summarize this section if the lands are alienable they can be leased as a matter of course. If they are inalienable and not the homestead or a part thereof they may be leased by adults for five years without the intervention of the court or the Secretary. If by minors for a period not exceeding five years upon approval of the court, in each case without the privilege of renewal. Restricted homesteads may be leased for one year without the approval of the court or the Secretary, but leases of restricted homesteads for more than one year, leases of restricted lands other than homesteads for a period of more than five years, and leases of restricted lands for oil, gas or other mineral purposes, can be made only with the approval of the Secretary of the Interior under rules and regulations prescribed by him.

In view of the recent decision of the Supreme Court of the State of Oklahoma that a lease is an alienation, perhaps leases can be made only where specifically authorized under this Section, except, of course, as to those cases in which the lands are alienable.

The agreements made by each of the Five Civilized Tribes with the United States contain provisions with reference to leasing. These provisions differ materially. The result of this provision is to fix a uniform rule for all of the tribes.

Under the Choctaw and Chickasaw agreements no provision was made for mineral, oil, or gas leases other than coal and asphalt and these leases were made directly with trustees for and on behalf of the Nation.

It may be seriously doubted, therefore, if leases for mineral, oil, or gas purposes upon land which was not alienable under the terms of these agreements were of any validity, unless specially authorized by the terms of the agreement or of some subsequent law.

Section 73. Mortgages.

Under the laws of Arkansas in force in the Indian Territory from the beginning of allotment until statehood, a mortgage of real estate passed the legal title to the mortgagee, leaving only the right of redemption in the mortgagor. This had been the uniform construction of the law by the Supreme Court of Arkansas for a period of time long anterior to the adoption of the Arkansas statutes by Congress for the Indian Territory. *Terry v. Russell*, 32 Ark. 478; *Turner v. Watkins*, 31 Ark. 429; *Kannady v. McCarron*, 18 Ark. 166; see also *Steele v. Carroll*, 12 Pet. 205. This being the case, it is believed that whenever the land was alienable, it was capable of being mortgaged, and that the mortgage passed such title as was then held by the allottee or the heirs of the allottee, as the case may be, to the mortgagee, and upon the passage of the full legal title to the mortgagor, the same passed by relation to the mortgagee as of the date of the mortgage. *Frame et al. v. Bivens et al.*, decided by the Supreme Court of Oklahoma, Sept. 11, 1908; *Landrum v. Graham*, 98 Pac. 432.

CHAPTER XIV.

MISCELLANEOUS PROVISIONS.

Section 74. Public roads.

By section 24 of the Act of April 26, 1906, it was provided:

“That in the Choctaw, Chickasaw and Seminole Nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highway or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.”

Did Congress have power to impose this burden upon the lands of those members of the tribes whose allotments were selected and accepted prior to this enactment. Each member of the tribe accepted his allotment upon the basis that he secured the land to the section line and was charged therefor upon such basis at the appraised value. After he has selected his allotment and such selection had been approved by the Secretary of the Interior, the land is segregated from the public domain and it is not believed that Congress could deprive him of the strip thirty feet wide along section line on two sides of his allotment. It would seem that this is a “taking of property without due process of law and without compensation.” The rule would perhaps be different where the allotment is selected and accepted after the passage of the law.

Section 75. Execution and acknowledgment of conveyances.

By the Act of Feb. 19, 1903 (32 U. S. Stat. L., 841), the chapter on Conveyances of Mansfield's Digest of the Statutes of 1884, was put in force in the Indian Territory. Under the provisions of this chapter conveyances of real estate may be made by deed in ordinary form, and the execution thereof either acknowledged before a Notary Public or other officer authorized by law to take acknowledgments, or may be attested by two disin-

interested witnesses, either of whom may appear before such officer and acknowledge the same. If the signature is by mark it should be attested by two witnesses, one of whom should write the name of the grantor, and in addition to this should be acknowledged as other conveyances of real estate are required to be acknowledged. It is not sufficient to have the acknowledgment only where the signature is by mark.

Section 76. Registration of conveyances.

Prior to the 19th day of February 1903, there was no statute in force in the Indian Territory providing for the registration or recording of conveyances of real estate. By common consent instruments conveying real estate had been recorded in the office of the clerks of the United States Court at the various places at which these officers were located in the Indian Territory. By the act above referred to provision was made for the recording of deeds and other conveyances and instruments in writing affecting lands situated in the Indian Territory, and Chapter 27 of Mansfield's Digest of the Statutes of Arkansas of 1884 were extended over and put in force in the Indian Territory. This act also created recording districts. Subsequently and at various times the boundaries of these recording districts were increased, thereby reducing the boundary of the other districts. All of the act except that which affects the boundaries of the recording districts will be found in Part II.

Section 77. Conveyances by married women.

By the Act of May 2, 1890, certain chapters of Mansfield's Digest, including chapter number 104, entitled "Married Women," were extended over the Indian Territory. Section 2621 of this chapter, which is the first section, reads as follows:

"The real and personal property of any *feme covert* in this state acquired either before or after marriage whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole* and the same shall not be subject to the debts of her husband."

Under the decisions of the Supreme Court of Arkansas, construing this statute, a married woman could convey and acknowledge as a *feme sole*. *Roberts v. Wilcoxson and Rose*, 36 Ark. 355; *Ward v. Estate of Ward*. 36 Ark. 586.

She could not, however, bind herself by a bond for title or other executory agreement (*Holland v. Moon*, 39 Ark. 120), but she might mortgage her property to secure the debt of her husband. *Scott v. Ward*, 35 Ark. 480; *Collins v. Wassall*, 34 Ark. 17.

Section 4621 is copied from the constitution of Arkansas of 1868. Previous to 1868 both under the constitution and the statutes the conveyance by a married woman of her property had to be joined in by her husband. By mistake of the digester the old provision in the chapter on conveyances with reference to the acknowledgment of a married woman, in force prior to the adoption of the constitution of 1868, was continued in the statute. It is Section 659, found in the chapter entitled "Conveyances of Real Estate," and is as follows:

"The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court, or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question, or that she had signed the relinquishment of dower for the purposes therein contained, or set forth without compulsion or undue influence of her husband."

The chapter containing this section having been put in force in 1903 subsequent to the extension of the chapter on married women over the Indian Territory, some question has arisen as to whether a conveyance by a married woman is valid where not joined in and acknowledged by her husband. Section 659 was not in force in Arkansas. The recording act, however, does not, like some of the previous acts, extend only such laws as are in force in Arkansas, but the language is that "chapter 27 of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of 1884, is hereby extended to and put in force in the Indian Territory so far as the same may be applicable and not inconsistent with any law of congress." It is not believed that Congress intended to deprive a married woman of the liberty given her under the married woman's act and recognized by every other law in force in the Indian Territory at that time. Such a conveyance made by a married woman and acknowledged as a *feme sole* would probably pass title to her property.

The Supreme Court of Arkansas in the construction of these statutes prior to their adoption has been more than usually se-

vere in requiring acknowledgments to literally comply with the language of the statute and denying to such instruments the right to registration or effect as notice if they fail to do so. *Johnson v. Godden*, 33 Ark. 600; *Martin v. O'Bannon*, 35 Ark. 62; *Ford v. Burks*, 37 Ark. 91; *Connor v. Abbott*, 35 Ark. 365; *Little v. Dodge*, 32 Ark. 453; *Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421; *Wentworth v. Clark*, 33 Ark. 432; *Shryock v. Cannon*, 39 Ark. 434; *Chaffee v. Oliver*, 39 Ark. 531; *Stidham v. Mathews*, 29 Ark. 650; *Beavers v. Baucum*, 37 Ark. 722; *Stilwell v. Adams*, 29 Ark. 346; *Magness v. Arnold*, 31 Ark. 103; *Scott v. Ward*, 35 Ark. 480; *Russell v. Umphlet*, 27 Ark. 339.

CHAPTER XV.

SEMINOLES.

Section 78. Tribal title.

By article 1 of the Treaty of 1856 between the United States and the Creek and Seminole Indians (11 U. S. Statute, 699), the Creek Nation granted, ceded and conveyed to the Seminole Indians a tract of country included within certain boundaries, being substantially the same country that subsequently constituted the Seminole Nation.

By the third article of the Treaty of 1866 entered into by and between the United States and the Seminoles (14 U. S. Stat. 755) it was recited: "The United States having obtained by grant of the Creek Nation the westerly half of their lands hereby grants to the Seminole Nation that portion thereof hereafter described which shall constitute the national domain of the Seminole Indians."

Then follows a description of the land granted and a recital that the Seminoles shall pay to the United States fifty cents per acre therefor.

Section 79. Citizenship.

By Article 2 of the Treaty of 1866 it is provided that inasmuch as there are many persons of African descent and blood residing among the Seminoles who have no property interest in the land and no civil rights "that hereafter these persons and their descendants and such others of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatsoever race or color who may be adopted as citizens or members of said tribe."

By the agreement entered into by and between the United States and the Seminoles, October 7, 1899 (31 U. S. Stat. 250) it is provided that the Commission to the Five Civilized Tribes in making the rolls of Seminole citizens pursuant to the act of Congress approved June 28, 1898, shall place on said rolls the names of all children born to Seminole citizens up to and including December 31, 1899, and the names of all Seminole citizens then living, and the rolls so made when approved by the

Secretary of the Interior, as provided in said act of Congress, shall constitute the final rolls of Seminole citizens upon which allotment of lands and distribution of money and other property belonging to the Seminole Tribe shall be made and to no other persons. There has been but little controversy over citizenship in the Seminole Nation, and there are perhaps no unsettled citizenship questions affecting title in that Nation.

Section 80. Allotment in the Seminole Nation.

Allotments in the Seminole Nation were selected in the same manner and under the same procedure as in the Choctaw and Chickasaw Nations. The provisions of the Seminole Agreement (30 U. S. Stat. L. 567), in the matter of selecting allotments, are much more simple and brief than in the Choctaw and Chickasaw agreement. Contests were fewer and less stubborn. The Seminole lands were among the first to be allotted and the questions arising out of the right to select any particular land in allotment have been disposed of and it is therefore unnecessary to discuss in detail the manner of selecting allotments in the Seminole Nation and of trying and determining contests. An allotment certificate issued to the Seminole allottee as it did to the Choctaw or Chickasaw allottee, but the patent was not to issue to Seminole allottees until the expiration of the tribal government, and this is apparently dependent upon the will of Congress. Subsequently Congress ordered the execution and delivery of patents prior to the expiration of the tribal governments.

Section 81. National citizenship.

The Seminoles were made citizens of the United States by the Act of 1901 conferring citizenship upon every Indian in the Indian Territory. The rights of citizenship thus conferred are identical with the rights conferred upon the Choctaws and Chickasaws by the same act and which is fully discussed under the above title in Section 22 to 24.

CHAPTER XVI.

RESTRICTIONS UPON ALIENATION.

Section 82. Alienation under Seminole agreement.

The lands of the Seminoles were allotted under the agreement of December 16, 1897, entered into between the United States and the Seminole Nation (30 U. S. Stat. 567). It contains the following provisions with reference to the alienation of lands allotted to members of the Seminole Tribe:

"All contracts for sale, disposition or encumbrance of any part of any allotment made prior to the date of patent shall be void. . . . When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and seal of the nation and deliver to each allottee a deed, conveying to him all the right, title and interest of the said nation and members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title and interest of the United States in and to the land embraced in said conveyance and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

It seems reasonably clear that under this provision and in the absence of further legislation the lands allotted to members of the Seminole Tribe of Indians would not become alienable until after the issuance of patent.

The provisions of the Act of April 21, 1904, removing all restrictions upon right to alienate as to the surplus lands of those who were not of Indian blood were applicable to all the adult members of the Seminole Tribe who were not of Indian blood.

The Act of May 27, 1908, removing restrictions is likewise applicable to all Seminole allottees.

Section 6 of the Act of April 26, 1906 (34 Stat. at L., 138-141) contained the following proviso:

“Provided that the Principal Chief of the Seminole Nation is hereby authorized to execute the deeds to allottees of the Seminole Nation prior to the time when the Seminole government shall cease to exist.”

What is the effect of this provision when considered in connection with the following provision of the Seminole agreement:

“When the tribal government shall cease to exist, the Principal Chief last elected by said tribe shall execute under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title and interest of the said nation and the members thereof in and to the lands allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as a relinquishment of the right, title and interest of the United States in and to the lands embraced in said conveyance and as a guarantee by the United States of the title of said lands to the allottee....”

Did it become the duty of the Principal Chief to execute and deliver these patents at or before the time the tribal government of the Seminole tribe would have expired but for the extension by the joint resolution of March 2, 1906, and by section 28 of the Act of April 26, 1906 (34 Stat. at L., 141)? The mere execution of the patent is a ministerial duty; it is doubtful if rights can either be conferred or deferred by the delay in the execution and delivery of the patent beyond the time provided or contemplated by law. Patents to Seminole allottees have not yet been executed and delivered. May the Secretary withhold the right of Seminole allottees to alienate the land, allotted to them, by withholding the execution and delivery of patents? If this is true, the Secretary by his action, or failure to act, may extend without limitation restrictions upon the rights of Seminole allottees to alienate their allotted lands.

It is insisted by those interested in sustaining the authority of Seminole allottees to convey their surplus allotments that the provision authorizing the execution of the patents before the expiration of the tribal governments is a repeal of the previous provision rendering the land inalienable until after the issuance of patents. There is cited in support of this contention the case of *Barney v. Dolph*, 97 U. S. 652, particular stress being placed upon the following quotation from the opinion:

“The prohibition of sales, although contained in section 4, applied to all persons entitled to the benefit of the act,

and its repeal was, under the circumstances, equivalent to an express grant of power to sell. The prohibition was of the sale, before patent, of the land to which the settler was entitled under the Act. The repeal, therefore, operated under the circumstances the same as a grant of power to sell the land even though a patent had not issued. This, in the absence of anything to the contrary, implied the power to convey all the government had parted with.

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in *Stark v. Starrs*, 6 Wall. 402. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land."

Contention is further made that it was the duty of the Secretary of the Interior, upon the approval of the Act of April 26, 1906, to prepare and furnish to the Principal Chief of the Seminole Nation patents to be executed and delivered, and that it was the duty of the Chief to execute and deliver the same with dispatch. The case would be stronger if there had been an agreement with the Seminoles providing that the tribal government should cease at a given time and that patents should be executed before the tribal government ceased to exist. Then there would have been a definite time fixed when the members of the tribe could have lawfully asserted that they were entitled to have the patents delivered. The Seminole agreement presents some very difficult questions to be solved, and this is not one of the least difficult. There is sufficient uncertainty about when the Seminole allottees may alienate that courts may reasonably differ in their opinions as to when such lands became or will become alienable.

Section 83. Alienation under the provisions of Act of April 21, 1904.

There were numerous persons residing in the Seminole Nation having the right of citizenship therein, who had prior to April 21, 1904, received allotments, and who were not of Indian blood. Perhaps some few received their allotments after April 21, 1904, although the Seminole lands were among the first to be allotted. Upon the approval of the Act of April 21, 1904, removing all restrictions upon alienation of surplus lands

of all adult persons who were allottees of the Five Civilized Tribes, and who were not of Indian blood, conveyances were made by many Seminole allottees before the issuance of patent upon the assumption that the removal of all restrictions upon the right to alienate removed all obstacles that would prevent alienation. The provision in the Seminole Treaty that all contracts for the sale, disposition or encumbrance of any part of the allotment made prior to the date of patent shall be void was generally regarded as a restriction upon alienation, and therefore repealed by the full and comprehensive language of the act of April 21, 1904, removing all restrictions upon the alienation of surplus lands of allottees who were not of Indian blood.

No patents had been issued to Seminole allottees at the time of the passage of the Act of April 21, 1904, and perhaps none have yet been issued, although under the provisions of the Act of April 26, 1906, authority was given to execute and deliver these patents before the expiration of the tribal government. If the effect of this Act was not to remove all existing obstacles to the alienation of the surplus lands of Seminole allottees who were not of Indian blood, the inclusion of the Seminoles within the provision amounts to nothing, and Congress must stand convicted of a grievous oversight or a grave misconception of what it had previously done.

The Supreme Court of Oklahoma gave this provision a most careful and thorough consideration in the case of *Godfrey v. The Iowa Land & Trust Company*, 95 Pac. 792. Chief Justice Williams in a most learned and exhaustive opinion discusses at great length the entire history of the alienation of allotted Indian lands, finally reaching the conclusion that of necessity this act must be treated as having removed all obstacles to the alienation of the surplus lands of adult Seminole allottees not of Indian blood. The opinion closes with the following language:

“What was the intention of Congress, when it removed restrictions from alienation of allottees not of Indian blood, as to their surplus allotments in the Seminole country? If the construction contended for by the defendant in error is correct, that act of Congress, removing restrictions as to allottees in the Seminole Nation was without effect whatever, because at the time the tribal government had not terminated, nor has it yet in all respects. We accordingly conclude that the herein allottee, Robert James, a member of the Seminole Tribe, but not of Indian blood, after selecting

his allotment and designating his homestead, and receiving his certificate of such allotment from the Chairman of the Commission to the Five Civilized Tribes, as provided for in the agreement of December 16, 1897, became the equitable owner of the same, vested with an indefeasible title therein, and that the duty or obligation to issue a patent therefor was imperative, and not discretionary, with the tribe or government and could make a binding sale, deed or conveyance of that part of the allotment not selected as a homestead, after the removal of restrictions or alienation by the Indian appropriation act, approved April 21, 1904, although no patent had been issued or delivered to said allottee before he undertook to alienate the same."

The opinion in this case is thorough and exhaustive. It is by a court, the majority of the members of which have lived for many years in the Indian Territory, have grown up with the country, and have had every day experience in the actual operation of these laws, and opportunity to consider their proper construction and application and is entitled to the very greatest consideration.

The homestead of the Seminole allottee consists of forty acres, non-taxable, and inalienable in perpetuity. The allotment in excess of the forty acre homestead is the surplus with which the above decision deals.

Section 84. Involuntary alienation.

It was provided in the Agreement of 1897 between the United States and the Seminoles, that all contracts for the sale, disposition or encumbrance of any part of allotments made prior to date of patent, should be void. Clearly no conveyance, agreement to convey or contract encumbering his allotment, by a member of the Seminole Tribe of Indians made before the 21st day of April, 1904, other than leases permitted or authorized by said agreement is valid.

It was also the purpose of this provision of the treaty to prevent the enforced alienation of allotted lands upon obligations entered into or liabilities created prior to the issuance of the patent.

The Act of April 21, 1904, being applicable to adult Seminole allottees, who were not of Indian blood, restrictions upon the right to alienate, were, by said Act removed as to the surplus lands of such members, and they could after that date convey or mortgage such surplus lands.

ction 85. Extension of restrictions upon alienation.

Congress undertook in the same Act by which it attempted extend the retrictions upon the right to alienate by the Choc-

taw and Chickasaw allottees of the full blood, to extend restrictions upon the right to alienate by the Seminole allottee of the full-blood. What is said with reference to the validity of this act in its application to the Choctaws and Chickasaws is applicable to the Seminoles.

Section 85A. Alienation as affected by the acts of April 26, 1906, and May 27, 1908.

The provisions of the Acts of April 26, 1906, and May 27, 1908, in so far as either affect restrictions upon alienation are applicable to the allottees of the Seminole Tribe. Those provisions of both of the Acts dealing with the right to alienate inherited lands are applicable to members of the Seminole Tribe and Freedmen. They are fully discussed in Sections 37 to 48, and what is said in these sections with reference to the provisions of these two Acts is applicable to the Seminoles. The same is true with reference to the subjects discussed in Chapters 7, 8, 9 and 10.

CHAPTER XVII.

MISCELLANEOUS PROVISIONS.

Section 86. Descent.

Under the second section of the Seminole Agreement of 1899 (31 U. S. Stat. L. 250) it was provided that:

"If any member of the Seminole Tribe of Indians shall die after the 31st day of December, 1899, the lands, moneys, and other property to which he would be entitled, if living, shall descend to his heirs who are Seminole citizens, according to the laws of Descent and Distribution of the State of Arkansas to be allotted and distributed to them accordingly, *Provided*: That, in all such cases where such property would descend to the parents under such law, the same shall first go to the mother, instead of the father, and then to the brothers and sisters and their heirs, instead of the father."

This provision of the Agreement makes considerable change in the laws of descent of Arkansas. It gives the mother, brothers, and sisters preference over the father, and limits the descent to heirs who are Seminole citizens. Prior to making this agreement on the 31st day of December, 1899, the descent of property in the Seminole Nation was probably controlled by the Seminole Law of Descent. The Act of April 28, 1904, making all of the laws of Arkansas in force in the Indian Territory applicable to the persons and estates of Indians and freedmen operated as a repeal of the provision of the agreement above mentioned, and established the Arkansas Law of Descent as the rule in all cases.

The Law of Descent in the Seminole Nation may be summed up as follows:

Prior to December 31, 1899, the subject of descent was controlled by the Seminole Law of Descent; from December 31, 1899, until April 28, 1904, the law was that of Arkansas as modified by the provision of the Agreement of December 31, 1899; from April 28, 1904, until November 16, 1907, the laws of Arkansas as found in Mansfield's Digest of 1884, controlled. Subsequent to November 16, 1907, and prior to May 27, 1908, the laws of the State of Oklahoma control. Subsequent to May 27, 1908, the laws of Oklahoma as modified by said Act control.

Section 87. Dower; curtesy and wills.

Dower being unknown among the Seminoles, that right was first created in the Seminole Nation by the extension of the laws of Arkansas then in force in the Indian Territory, so as to make them applicable to the persons and estates of Indians and freedmen by the Act of April 28, 1904. It is possible that dower being an essential part of the law of descent that, dower rights were created by the provisions of the Seminole agreement of 1899, making the Arkansas law of descent applicable to the Seminoles.

. For a general discussion of the subject see this same title under Choctaws and Chickasaws. The same statute was applicable to all of these tribes.

What is said with reference to dower is applicable to curtesy, that right being a creature of the common law and unknown to Indians. It became effective as to them only when made so by the extension of the laws of Arkansas so as to make same applicable to the persons and estates of Indians and Freedmen.

For a general discussion of this subject see the same title under the Choctaws and Chickasaws.

The right of the Seminole allottee to dispose of his allotment by will is dependent upon the same statutes as is the right of the Choctaw and Chickasaw allottee, therefore what was said with reference to the right of the Choctaw and Chickasaw allottee to dispose of his allotment by will is applicable to the Seminole allottee.

Section 88. Leases.

The agreement of 1897 provided that "Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the Tribal Government, and before the same shall become effective, it shall be approved by the Principal Chief and a copy filed in the office of the Clerk of the United States Court at Wewoka." This language is peculiar if it is intended as a restriction upon the right to lease. It gives the right affirmatively to make a lease of a given character but it nowhere either directly or indirectly prohibits the making of a lease of any other character. Perhaps the draughtsman of this agreement considered a lease an alienation *pro tanto* and deemed it necessary in view of the prohibition against alienation to specifically authorize leasing. The Supreme Court of Oklahoma has recently held that a lease by an allottee is an alienation *pro tanto* within the terms of the statute permitting certain classes of persons to alienate.

Section 20 of the Act of April 26, 1906, is applicable to the allotted lands of the Seminoles. It requires all leases and rental contracts for more than one year upon the homestead of the full-blood allottee to be in writing, and subject to the approval of the Secretary of the Interior. Such lease is declared to be absolutely void until so approved. This section does not affect the right to lease the surplus allotment. The homestead of the Seminole allottee consists of forty acres, and is made inalienable and non-taxable as a homestead in perpetuity.

Section 89. Mineral leases.

The Seminole Agreement of 1897 reserves to the tribe one-half of all the royalty accruing to the allottees from coal, mineral, coal oil or natural gas found on their allotments. Such division of royalty is to continue during the existence of the tribal government, which, as heretofore noted, is entirely dependent upon the action of Congress. No mineral lease made by a Seminole allottee is of any validity unless made with the tribal government by and with the consent of the allottee, and approved by the Secretary of the Interior.

Section 90. Public roads.

The Seminole Agreement contained no provision whatever for public roads and the Seminole lands were allotted without any provision having been made therefor. Section 24 of the Act of April 26, 1906 provided that "In the Choctaw and Chickasaw and Seminole Nations, public highways or roads two rods in width, being one rod on each side of the section line, may be established on each section line; and allottees, purchasers and others shall take title to such land subject to this provision. The effect and probable validity of this statute is discussed in Section 74. What is there said with reference to Choctaw and Chickasaw allottees is applicable to Seminole allottees. It is probable, however, that all of the Seminole lands had been allotted at the time of the approval of the Act of April 26, 1906.

Section 91. Miscellaneous provisions.

The subjects of the execution, acknowledgment, and registration of conveyances of real estate were fully discussed under each title respectively, in that part of this treatise devoted to the Choctaws and Chickasaws. What was there said with reference to these subjects as applicable to the Choctaw and Chickasaw allottees is applicable to the Seminoles.

The same is true with reference to the subjects discussed in the following section, to-wit: Sec. 33-A, Sections 35 to 47; 51 to 57-A; 62-63-65-66-68-72-73-74 and 77.

CHAPTER XVIII.

MUSCOGEE OR CREEK NATION.

TRIBAL TITLE, CITIZENSHIP AND ALLOTMENT.

Section 92. Tribal title.

The tribal title to the lands of all of the Five Civilized Tribes were secured about the same time and by treaties almost identical in language and by patents very similar. The Creek patent bears date of August 11, 1852, and is made pursuant to the treaties therein recited and is as follows:

"THE UNITED STATES OF AMERICA.

"To All Who Shall See These Presents, Greeting:

"Whereas, A treaty was made and concluded on the fourteenth day of February, in the year of Our Lord, Eighteen Hundred and Thirty-three, in the words following, to-wit:

"ART. 2d. The UNITED STATES hereby agree with the consent of the CREEK and CHEROKEE delegates, this day obtained, that the MUSKOGEE or CREEK COUNTRY West of the Mississippi shall be embraced within the following boundaries, viz: Beginning at the Mouth of the NORTH FORK of the CANADIAN RIVER and run Northerly four miles, thence running a straight line so as to meet a line drawn from the South Bank of the ARKANSAS RIVER opposite to the East of Lower Bank of GRAND RIVER at its Junction with the ARKANSAS RIVER, and which runs a course South 44 degrees, West one mile, to a post placed in the ground, thence along said line to the ARKANSAS, and up the same and the VIRDIGRIS RIVER to where the old Territorial Line crosses it, thence along said line North to a point twenty-five miles from the Arkansas River where the Old Territorial Line crosses the same; thence running at right angles with the Territorial Line aforesaid, or West, to the MEXICO Line; thence along the said line Southerly to the CANADIAN RIVER; or to the Boundary of the CHOCTAW COUNTRY; thence down said River to the place of beginning.

"The lines hereby defining the Country of the MUSKOGEE INDIANS on the North and East, bound the country of the CHEROKEE along these courses as settled by the treaty concluded this day between the UNITED STATES and that Tribe.

"ART. 3d. The UNITED STATES will grant a Patent in fee simple to the CREEK NATION for the land assigned said NATION by this Treaty or Convention, whenever the same shall have been ratified by the PRESIDENT and SENATE of the UNITED STATES; and the right thus granted by the UNITED STATES shall be continued to said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the Country hereby assigned them.

"ART. 4th. It is hereby mutually understood and agreed between the parties to this Treaty that the land assigned to the MUSKOGEE INDIANS by the second Article thereof, shall be taken and considered as the property of the whole MUSKOGEE or CREEK NATION, as well as those now residing upon the land as of the great body of said Nation who still remain on the East side of the MISSISSIPPI; and it is also understood and agreed that the SEMINOLE INDIANS of FLORIDA, whose removal to this Country is provided by their Treaty with the UNITED STATES dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the Country of the CREEK NATION; and they, the SEMINOLES, will hereafter be considered a constituent part of said Nation but are to be located on some part of the CREEK COUNTRY by themselves; which location will be selected for them by the Commissioners who have signed these Articles of Agreement or Convention.

"Now know ye, that the UNITED STATES of AMERICA in consideration of the premises and in conformity with the above recited provisions of the Treaty aforesaid have given and granted, and by these presents do give and grant unto the said MUSKOGEE or CREEK TRIBE of INDIANS the Tract of Country above described. To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and Continue to occupy the Country hereby assigned to them.

"IN TESTIMONY WHEREOF, I, MILLARD FILLMORE, PRESIDENT of the UNITED STATES of AMERICA have caused these letters to be made patent and the SEAL of the DEPARTMENT of the INTERIOR to be hereto affixed.

"Given under my hand at the CITY of WASHINGTON the Eleventh day of August in the Year of OUR LORD One Thousand Eight Hundred and Fifty-Two and of the INDEPENDENCE of the UNITED STATES the Seventy-Seventh.

MILLARD FILLMORE.

By the President.

ALEXANDER H. H. STUART,

Secretary Department of the Interior.

PHILLIP H. RAIFORD,

United States Agent for the Creek Indians."

In 1866 the Creeks made a new treaty with the United States which was proclaimed August 11th of that year, the result of which was to ratify and confirm the title conveyed by the patent above referred to. The patent following largely the language of the treaties upon which it was issued and reciting the same, it is hardly necessary to make further reference thereto.

Section 93. Citizenship.

By the second article of the treaty of 1866 by and between the United States and the Creek Tribe of Indians, it was provided "inasmuch as there were among the Creeks many persons of African descent who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country, under their laws and usages, or who have been thus residing in said country and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of said Nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof), shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and National funds; and the laws of said Nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe." (14 State. 785).

The rights of citizenship thus given to Creek freedmen were afterwards recognized and confirmed by subsequent legislation of both the Creek tribal council and the Congress of the United States, and the number of persons thus admitted to Creek citizenship constituted a large per centage of the total membership of the tribe at the time of the allotment of the lands among the members thereof. Separate rolls were made of these freedmen and the chief part of the controversy over citizenship in the Creek Nation arose over the identity of the persons thus admitted to citizenship in general terms.

Between 1866 and 1896 the conditions existing in the Creek Nation, both general and with reference to citizenship, were sub-

stantially the same as existed in the Choctaw and Chickasaw Nation and described in Sections 9 and 10. Under the act of 1896 the procedure and manner of determining citizenship in the Creek Nation was identical with that of determining citizenship in the Choctaw and Chickasaw Nations as discussed in Sections 12 and 13; the constitutionality of this legislation was sustained as shown in Section 16.

Section 94. Citizenship—Continued.

Section 21, of the Act of June 28, 1898, provided as follows:

“Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, . . . The roll of Creek freedmen made by J. W. Dunn under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation. . . . The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.”

On the 25th day of June, 1901, the president promulgated an agreement between the Creeks and the United States which had been approved by Congress March 1, 1901, and by the Creek council May 25, 1901. Section 28 confirmed the provisions of the Act of June 28, above referred to, and provided that no persons should be added to the rolls of citizenship of the tribe after the date of the agreement except as therein provided and no person whomsoever should be added after the ratification of the agreement.

It was further provided in Section 28 that if any citizen enrolled under the provisions of Section 21 of the Act of June 28,

1898, had "died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted and distributed to them accordingly."

It is further provided "that all children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The provision for making the rolls final was as follows: "The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Under section 29, the persons who are excepted in the first paragraph of section 28, as those who might be enrolled between the date of the agreement and its ratification, were full-blood Creek Indians residing in the Cherokee Nation and full-blood Creek Indians recently removed from Texas, and full-blood Creeks who then resided in Texas and such other recognized citizens found on the Creek rolls as might by reason of non-residence be excluded from enrollment by Section 21 of the Act of June 28, 1898. There was a proviso, however, that non-residents who should in good faith remove to the Creek Nation before the commission completed the rolls of Creek citizens as aforesaid, might secure the benefits extended.

Section 95. Citizenship—Continued.

By section 2 of the Act of April 26, 1906, it was provided that "for ninety days after the approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this

section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled."

Section 3 of this same act contained the following provision with reference to freedmen:

"That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior."

Section 96. Striking names from rolls by Secretary, March 4, 1907.

The names of a number of citizens of the Creek Nation were stricken from the roll by the Secretary of the Interior on March 4, 1907, under the same general order by which the names were stricken from the Choctaw and Chickasaw rolls discussed in section 11.

One of the Creek freedmen brought a suit to compel the Secretary of the Interior to restore her name to the roll, asserting that the Secretary had no right to strike her name from the roll after he had once approved it. The Secretary answered this application by asserting that the enrollment had been procured by fraud and without authority of law. To this the counsel for the freedman demurred, and the Court of Appeals for the District of Columbia held that the demurrer confessed the fraud, that the relief sought was of an equitable nature and that no person was entitled to appeal to a court of equity to enforce a legal right obtained through fraud, and denied the application for the writ. *Garfield, Secretary of Interior v. U. S. ex rel. Lucy Ann Turner et al.*, 36 Wash. Law Reporter, 410. (See Sec. 17 and 18).

Section 96a. Selection of allotment.

Section 3 of the Creek agreement (31 U. S. Stats., 861), provided:

"All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value,

as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him. One hundred sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values.”

Under the provisions of the Act of June 28, 1898, temporary allotments were made of the surface of the land to members of the Creek tribe.

These selections were confirmed by Section 6 of the Creek agreement in the following language:

“All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission.”

Section 6 as above set out, together with its effect upon previous allotments, is considered by the Supreme Court of Oklahoma in the case of *DeGraffenreid v. Iowa Land & Trust Company*, 96 Pac. 624, and the syllabus of the case, which under the statutes of Oklahoma is made the law thereof, declares the effect of this section as follows:

“The sole effect thereon of Section 6, of the act of March 1, 1901 (31 U. S. Stat. 863, c. 676), being to place said allotment on an equal footing as to rights and title with allotments theretofore made under and by virtue of Act June 28, 1898, c. 517, 30 U. S. Stat. 495, and does not operate as a legislative grant of the legal title in fee.”

CHAPTER XIX

RESTRICTIONS UPON ALIENATION.

Section 97. Involuntary alienation; restrictions upon.

Section 7 of the Creek agreement provides that:

"Lands allotted to citizens hereunder shall not in any manner whatever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above. . . .

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation."

This same subject is covered in Section 16 of the Supplemental Creek agreement, approved June 30, 1902, in the following language:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. . . .

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of chil-

dren born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

While there is a difference between the language of the two agreements it is probable they mean substantially the same thing. Section 16 of the Supplemental agreement stops after the word "obligation" in the third line of the paragraph, "or sold to secure or satisfy any debt or obligation," while in the original agreement the word "obligation" is followed by the words "contracted or incurred prior to the date of the deed to the allottee therefor."

To give the provisions of Section 16 a broader construction than those of Section 7 would practically mean that the lands were never to become subject to enforced alienation and to give this same language any narrower construction would perhaps permit the sale of the lands after the expiration of the five-year period on debts contracted, liabilities incurred or judgments recovered before the expiration of that period.

The Supreme Court of the State of Oklahoma in the case of *Western Investment Company v. Kistler*, decided September 12, 1908, 97 Pac. 588, holds that the surplus allotment of a member of the Creek Tribe of Indians is not subject to involuntary alienation for the satisfaction of a judgment recovered on a debt contracted prior to the time when the restrictions upon alienation were removed under the terms of this act by the Secretary of the Interior. The reason given by the court is as follows:

"We believe that congress, by the first clause of Section 16, supra, intended to protect the lands allotted to citizens of the Creek Nation against involuntary incumbrance or forced sales of any kind to secure or satisfy any debt or obligation for a period of five years, unless the Secretary of the Interior approved such involuntary incumbrance, sale or taking. This part of the provision is not a restriction upon the allottee or his heirs, but is in effect

an exemption law to protect his surplus allotted lands from forced sale for the period of five years to satisfy *any debt or obligation incurred while the exemption was in operation.*"

Section 98. Voluntary alienation; restrictions upon.

The provision with reference to alienation in Section 7 is that such lands "shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior." The provision in Section 16 is "nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior."

By this provision the restrictions upon alienation were extended from the date of the ratification of the original to the date of the approval of the supplemental agreement. The original agreement seems to have been approved March 1, 1901, ratified by the Creek Council May 25, 1901, and proclaimed by the President June 25, 1901. The supplemental agreement was approved by the President June 30, 1902, by the Creek Council July 26, 1902, and proclaimed by proclamation of the President issued August 8, 1902.

Both sections contain substantially the same provision with reference to the reservation of the homestead for the use of children born after May 25, 1901, that being the date of the approval of the original Creek agreement, upon which this right is made to depend in Section 7 and being the date fixed in Section 16. The reason for this reservation in both as to children born after May 25, 1901, is that under the terms of both of these agreements children born after that date would not be entitled to have an allotment of lands. This being true the children born prior to that time having an allotment of their own it was deemed wise to reserve the homestead for the use of the children who would have no allotment nor any means of support or protection upon the death of the parents.

In both cases where there were no children born subsequent to the 25th day of May, 1901, and no will executed, the lands referred to descended free of the limitations upon alienation contained in Sections 7 of the original and 16 of the supplemental agreements respectively.

The Supreme Court of the State in the case of *DeGraffenried v. Iowa Land & Trust Company* discussing these provisions of Section 7 used the following language.

"This fixed the status of those allotments, including that of Castella Brown. Then, as if to dispose of the whole subject of the descent of all allotments which had been made or would be made thereunder before descent cast, the agreement provides: 'Sec. 7. Lands allotted to a citizen hereunder (which includes that of Castella Brown) shall not in any manner whatsoever or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior. . . . (Limitation.) Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years (another), for which he shall have a separate deed, conditioned as above: *Provided*, . . . the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue (Castella Brown had none) then he may dispose of his homestead by will (she made none) free from limitation herein (the last above) imposed, and if this be not done (no will made) the land (What land? The Homestead? No, or it would have said so. What lands are we talking about? Lands allotted to citizens hereunder—the whole allotment) shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.' What limitation? The last above on the homestead. Hence, as the lands in controversy were 'lands allotted' within the purview of the first words of this section, they fell squarely within it, and their devolution is governed according to the laws of descent and distribution of the Creek Nation in force at the time of the death of Castella Brown."

This case involved not only the question of descent and distribution but the question of whether or not both the surplus and homestead allotments of Castella Brown were alienable at the time of the execution of the conveyance by the heirs of the said Castella Brown.

According to the agreed statement of facts in this case Castella Brown, a duly enrolled citizen of the Creek Nation,

selected her allotment April 22, 1899; she died June 7, 1902. Patents were issued September 22, 1904. The mother conveyed to the Iowa Land & Trust Company in July, 1905. In August, 1905, Henrietta Stewart and George Brown, brother and sister, respectively, of Castella Brown, conveyed to the Iowa Land & Trust Company. It will be noted that all of these conveyances were made before the expiration of five years from the approval of the supplemental agreement. The claim of DeGraffenreid rested on a conveyance made in July, 1904, by Ben Reeves, the husband of Castella Brown, which conveyance was likewise made before the expiration of the five years provided for in the treaty. In September, 1904, Shelley Brown, another sister, conveyed to certain parties who subsequently conveyed to the Creek Land & Improvement Company. All these conveyances were made prior to the expiration of the five year period and all covered the interest of the respective parties in both the surplus and homestead allotments.

The Supreme Court held that the term "land" referred to in the following sentence "and if this be not done the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation free from such limitation" applies to entire allotment. Apparently, however, there is a condition of affairs to which this opinion has no application. Suppose that either a child had been born after April 25, 1901, or the homestead had been disposed of by will, would the reasoning of the court be applicable to the surplus allotment.

For the effect of that part of Sections 7 and 16, *supra*, reserving a homestead for the minor children born subsequent to the approval of the original agreement, see the subject of Descent and Distribution.

In the recent decision of the Supreme Court of the State of Oklahoma, in the case of *Sanders v. Sanders* (decided March 9, 1909), that court further construed the provisions of the Original and Creek Supplemental Agreements with reference to alienation of inherited lands, and who constituted the heirs of a deceased allottee under the provisions of the Original and Supplemental Agreements and the laws of the Creek Nation. This decision also involved the right to alienate lands selected under the Act of June 28, 1898, simply allotting the surface of

the lands to the members of the Tribe before the approval and ratification of said Act, by the provisions of the Original Creek Agreement. The land in controversy was selected in allotment by Sarah E. Sanders on the 19th day of September, 1898. After selecting the land and taking possession thereof, and before the issuance of the certificate of allotment and before the passage of the Act of Congress known as the Original Creek Agreement, Sarah E. Sanders died. Discussing this phase of the matter, the court said:

“Section 11 of that Act, in effect, provides for the surface allotment of the land of the Creek Nation without the consent of the Tribe and Section 30, in effect, for the resubmission, with certain modifications of said agreement of September 27, 1897, to the Creek people and that, if ratified, its provisions, so far as they differed from said bill, should supersede it. This agreement also failed of ratification and the United States proceeded to allot said land without the consent of the tribe under the provision of said Curtis Bill. For that purpose said Commission on April 1, 1889, opened the land office at Muskogee. “At that time the fee to the lands of the Creek Nation was in the tribe and it is apparent that Congress by that Act did not intend to disturb it and therein made no provision whereby the fee might be divested out of the tribe and vested in the allottee. The main intent of it was to segregate the lands in fair and equal share, place the citizen upon his segregation and give to him the exclusive use and occupancy of the soil until such time as title to him thereto could be perfected.”

The court then proceeded to a discussion of the case of *Wallace v. Adams*, 143 Fed. 716, holding that the lands of the tribe are public lands and that a member of the tribe prior to allotment had no vested interest in the property; and concluded as follows; upon that phase:

“We are therefore of the opinion that when Sarah E. Sanders appeared before said Commission, filed on and took possession of her allotment and died, she had no vested right therein and was at that time seised of no inheritable estate in said land.”

Substantially the same conclusion is expressed in the case of *Hayes v. Barringer*, decided by the Circuit Court of Appeals for the Eighth Circuit, March, 1909, involving the right to convey property by will. The conclusion of that court, as stated in paragraph 2 of the syllabus, is as follows:

"The right and equity of an enrolled member of the Chickasaw Nation of Indians, who died testate in 1903 before receiving an allotment, to a just share of the lands of the Chickasaws and Choctaws, was not devisable and the title to the lands subsequently derived therefrom was not affected by the will."

The court further held that the prohibition against alienation was sufficiently broad to, and did, prohibit disposition by will. By this decision wills are put upon exactly the same footing with reference to the right to dispose of property thereby as are other forms of conveyances.

In the case of *Sanders v. Sanders*, supra, the court held that section 7 of the Original Creek Agreement was a clear, emphatic and unequivocal inhibition against the alienation of any part of the allotted lands, including both homestead and surplus, within the period of prohibition declared in said section. (Citing in support of these conclusions the previous opinion of that court in the case of *DeGraffenreid v. Iowa Land & Trust Co.*, and an opinion by the Attorney-General of the United States rendered on the 10th day of August, 1906.)

There has been some controversy under section 7 of the Original Creek Agreement as to whether or not the homestead became alienable immediately upon the death of the allottee or whether the limitation contained in said section prohibiting alienation for a period of five years applied to the entire allotment. This decision meets and squarely decides the question in favor of the contention that the prohibition against alienation is applicable to both surplus and homestead.

Section 99. August 8, 1902, the date of approval of Supplemental Agreement from which the five-year period of restrictions upon alienation runs.

Section 16 of the Supplemental Agreement provides that the lands allotted to citizens "Shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement."

The Act of Congress containing this Agreement was approved by the President June 30, 1902; by the Creek National Council July 26, 1902; and proclaimed by the President of the United States August 8, 1902. Inasmuch as the restrictions

upon alienations continued for five years from the date of the *approval* of this Agreement, it becomes material to determine what constitutes *approval* within the purview of that word as used in Section 16.

Section 21 of this Agreement is as follows:

"This agreement shall be binding upon the United States and the Creek Nation, and upon all persons affected thereby when it shall have been ratified by Congress and the Creek National Council, and the fact of such ratification shall have been proclaimed as hereinafter provided."

Section 22 provides for the transmission of the notice of ratification by the Creek National Council to the President of the United States, and "Thereupon the President shall issue his proclamation making public announcement of such ratification, thenceforward all the provisions of this Agreement shall have the force and effect of law."

By the terms of the Agreement it is not to become effective until its ratification by both parties and notice of the ratification by the Creek Council is transmitted to the President of the United States, and he issues his proclamation; thenceforward all of the provisions of the Agreement are to have the force and effect of law.

The Supreme Court of Oklahoma has given this subject most careful consideration in a recent opinion in the case of *Baker v. Hammett*, decided 1909, and not yet reported. The reasoning of the court is so clear and logical that quotation is liberally made. Mr. Justice Dunn, speaking for the court, after stating the issues continues as follows:

"Counsel for defendants in error strenuously insist and argue that the controlling date of approval was June 30, 1902, and that the five-year period of restriction upon the power of the citizens of the Creek Nation to alienate their lands began to run on that date. This argument is based upon Section 16, which provides, as we see, that 'Lands allotted to citizens shall not . . . be alienated by the allottee or his heirs before the expiration of five years from the date of the *approval* of this Supplemental Agreement.' And that if word *approval*, as contained in this section, did not apply to the date when Congress approved the Act, that it did relate to the date when the same was approved by the Creek National Council, to-wit: July 26, 1902. They insist, however, that defendants in error are entitled to prevail, even should this Court find that the correct date

was neither of these but was August 8, 1902, at which time the President issued his proclamation making public announcement of the ratification of the agreement.

"Counsel for plaintiff in error take the position and argue that the restriction upon the alienation of this land by their client's grantor were removed on the 7th day of August, 1907, and not before, and that when the deed was executed by the allottee to him on August 8, 1907, it conveyed to him the full legal title; that this was the earliest date that the allottee could convey such title, and that after having made this conveyance, the one made and delivered to the defendants in error on the day following, to-wit: August 9, 1907, conveyed no title.

"The foregoing succinctly states the contentions of the parties to this controversy. We are not able to agree with counsel for defendants in error on either of the first two propositions; either that the date of June 30, 1902, or July 26, 1902, was the date from which the five-year period should be computed.

"Close scanning of the enacting clause, taken in conjunction with Sections 21 and 22, presents, it seems to us, the provisions which must be held to be controlling. Stripping each of these of the verbiage not necessary to be considered for our present purpose, they would then read substantially as follows:

"The following Supplemental Agreement shall be *binding* upon the United States and the Creek Nation and upon all persons affected thereby *when it shall have been ratified by Congress and the Creek National Council*, and the fact of such ratification *shall have been proclaimed*; . . . if the Agreement be ratified by the (Creek) National Council . . . the president shall issue his proclamation making public announcement of such ratification, *thenceforward* all the provisions of this Agreement shall have the force and effect of law.'

"From this language it will be noticed that the act on the part of the United States was passed subject to and became binding only after the happening of two contingencies, first, its ratification by the Creek National Council, second, the public announcement thereof by proclamation by the President of the United States. Congress, no doubt, had the power to make as conditions precedent to its validity, binding force and effect the two conditions above named. This being true, until these concurred, in our judgment the act was not binding upon the United States or Creek Nation, and no one was affected thereby.

"Counsel for defendants in error insist that the word 'approval' as used in Section 16, must be given some force and effect distinguishable from the word 'ratified,' as used in

Sections 21 and 22. On this we are likewise not able to agree with counsel. There is nothing in our judgment in the act itself, or in the context and relationship, in which the two words are used which require the distinction sought to be drawn to be made. Webster defines the word 'ratify' as follows: 'To approve and sanction; to make valid; to confirm; to establish; to settle; especially, to give sanction to, as something done by an agent or servant; as, to ratify an agreement, treaty, or contract.' The word 'approve' is by the same author rendered synonymous with 'to sanction officially; to ratify; to confirm.' The Century Dictionary and Cyclopedia defines 'ratify' as, 'To validate by some formal act of approval,' and 'approval' is defined as 'to sanction officially; ratify authoritatively.'

"Thus we see that the highest lexicographic authority exists for the interchangeable use of the terms 'approve' and 'ratify,' and from the view of the salient features of the act relating to its ratification or approval which we have above noted, and the force which we believe is carried thereby, we are not able to agree that when the word 'approval' is used as it is in section 16 that it related solely to the action on the part of the United States. Nor do we find any reason within the act to hold that a different date was intended to be operative in reference to the provisions of the agreement relating to the alienation of the lands from that affecting the other general provisions thereof.

"The foregoing presents our views upon this question, and we hold that August 8th, 1902, the date of the proclamation of the President making public announcement of the ratification of the act by the Creek National Council was the date when the provisions thereof became binding upon the United States, the Creek Nation, and all persons affected thereby, and that thenceforward was the earliest date that its provisions had the force and effect of law."

Section 100. The period of five years prescribed in the treaty expired at midnight, August 7, 1907.

Ordinarily it would not seem that a sufficient number of conveyances would be made upon any one date to make the question of whether restrictions upon alienation expired upon the midnight following or succeeding such date a matter of importance. However, that is not the case, so far as the Creek Supplemental Agreement is concerned. Many thousand acres of land became alienable upon the expiration of five years from the date of the approval of the agreement. Many persons who had been looking forward to making purchases were anxious to complete the same on the first date they could legally do so, in order

to prevent others from securing the much coveted prize. Many conveyances were taken on the 30th of June, 1907, on the assumption that June 30, 1902, the date of the approval of the Act of Congress containing this Agreement by the President, was the date of the approval. Many more were taken on July 26, 1907, upon the assumption that July 26, 1902, the date of the approval by the Creek National Council, was the date of the approval referred to in Section 16. By far the larger number of these conveyances were taken on August 8, 1907, upon the assumption that the date of the proclamation issued by the President proclaiming the ratification of said Agreement, to-wit: August 8th, 1907, was the date of the approval contemplated in Section 16. A great many parties, assuming that the five year period did not expire until midnight of August 8th, took second conveyances on August 9th, and on subsequent dates to the lands that had been conveyed on August 8th. Much litigation has arisen over the exact time at which such restrictions upon alienation expired.

The Supreme Court of the United States, in *Taylor v. Brown*, 147 U. S. 640, in construing a very similar statute, stated the rule as follows:

"In computing the time during which the alienation of public land acquired by an Indian under the provisions of Section 16 of the Act of March 3, 1895, Chapter 131 (18 Stat. 420) is forbidden, the date of the issue of the patent should be included."

The Supreme Court of Oklahoma, in the case of *Baker v. Hammett*, supra, had under consideration this identical provision of the Creek Agreement. The rule is so clearly declared, and the reason therefor so well presented, that attention is called to the following quotation from that opinion:

"This brings us to the question of which conveyance, the one made to plaintiff in error on August 8, 1907, or the one to defendants in error August 9, 1907, should prevail. Except where a different intention is manifest, the general rule is that in computing time from or after a certain day or date, the first day is to be excluded, and the last included, to complete the period. Lewis' Sutherland Statutory Construction (2nd Ed.), 1904, Sec. 184. The rule thus indicated is by no means uniform, however, as an investigation of the cases wherein it is involved shows. The courts are sometimes largely swayed by the facts of the particular

case before them, and the connection in which the question arises. Those interested will find the subject elaborately treated in notes to the cases of *State v. Michel*, 78 Am. St. Rep. 364, and *Wyoming v. Supreme Court*, 49 L. R. A. 201. On this subject in a case in which very full consideration is given to it, *Taylor v. Brown*, 5 Dak. 335-349, Justice Thomas said: "We do not claim that there is uniformity of decisions of the courts of this country in regard to this question, but we admit that there is somewhat of conflict; but, from a thorough examination of them, we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which will uphold and enforce rather than destroy bona fide transactions and titles, and whenever it is necessary to prevent a forfeiture, or to effectuate the clear intention of the parties, the *dies a quo* will be included, otherwise they will be excluded. We think that the word "from" in its literal and restricted sense, means "exclusive," but it may be used in a connection that means inclusive, and it is quite frequently used in the latter sense; and, therefore, in construing it, courts will take into consideration the context and subject-matter, and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection.'

"This case is similar to the case at bar in that there is involved therein the construction of an Act of Congress relating to the alienation by Indians of their lands received under and by virtue of its terms. The facts out of which the controversy arose are stated, and the portion of the Statute involved is quoted by the court as follows:

"'On the 15th of June, 1880, one Thomas K. West, a Santee Sioux Indian, became the owner of the lands described in the pleadings by a patent from the United States. The said West, being an Indian, received his title under the provisions of the Statute of the United States giving certain Indians who should abandon their tribal relations the right to enter and hold lands under the homestead law. The Statute above referred to contains the following proviso; "Provided, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for the period of five years from the date of the patent therefor." (18 U. S. St. at Large, 420.)'

"The Indian, West, made two deeds to the land, one on the 15th day of June, 1885, and the other on the 17th day of June, 1885, and the question before the court was which of these deeds was valid and conveyed title. It will be observed that this depended upon the construction to be

placed upon that portion of the Act which provided that the title to the lands acquired thereunder should 'be and remain inalienable for a period of five years from the date of the patent issued therefor.' And the court, in construing this statute, included the day of the date of the patent and decided that the deed made on the 15th day of June, 1885, was a valid and legal conveyance of the land, and that that day was not within the period of limitation provided for by the statute. The case was appealed to the Supreme Court of the United States, and is reported in the 147 U. S. 640; that court, in affirming the Supreme Court of the Territory of Dakota, held:

"'In computing the time during which the alienation of public land acquired by an Indian under the provisions of Section 16 of the Act of March 3, 1875, c. 131 (18 Stat. 420), is forbidden, the day of the issue of the patent should be included.'

"The theory upon which the Supreme Court of the United States held that the day of the date that the patent was issued should be included seems to be that except for the limitation taking effect, at the same moment with the delivery of the patent, the patentee could have alienated the land on receipt of patent. The restriction upon alienation existed on the delivery of the patent, and this provision of the statute was simply a continuation of the restriction which already existed. The limitation on alienation was to be and remain, that is to say, was to be on the first day not subject to alienation, and so remain until the five years has expired. In the case at bar, it will be observed that the language of the act restricting alienation by the allottee is, that his land should not be alienated 'before the expiration of five years from the date of the approval of this supplemental agreement,' which, in our judgment, so far as this case is concerned, means the same thing as the language of the act construed by the Supreme Court of the United States providing that lands acquired thereunder should 'be and remain inalienable for the period of five years from the date of the patent issued therefor.' This construction on the part of the Supreme Court of the United States we regard as controlling, and we therefore hold that the deed executed and delivered on August 8, 1907, to the plaintiff in error, was valid."

Section 101. Conveyances in violation of agreement, declared void.

The concluding clause of Section 16, supra, "Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not

susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity," is intended to prevent by indirect and circuitous methods the accomplishment of either voluntary or involuntary alienation in contravention of the provisions prohibiting the same found in said sections. (*Goodrum v. Buffalo*, 162 Fed. 817; *Blakemore v. Johnson*, 103 Pac. 554.)

Section 102. Alienation of lands allotted in name of deceased, under Section 28 of Creek Agreement.

Section 28 of the Creek Supplemental Agreement is as follows:

"Section 28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said roll after the ratification of this agreement. All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the act of Congress approved June 28, 1898, entitled 'an act for the protection of the people of the Indian Territory and for other purposes,' shall be placed upon the rolls to be made by said Commission, under said act of Congress, and if any such citizen has died since that time, or may hereafter die before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be so entitled to enrollment, up to and including the first day of July, 1900, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

This provision differs somewhat from the provision of the Choctaw and Chickasaw and Cherokee Agreements, providing for an allotment in the name of the deceased member. This statute has received very careful and exhaustive consideration in an opinion by Campbell, District Judge, in the case of *Shulthis v. MacDougal* (162 Fed. 331). The land in controversy was that allotted under section 28, as the allotment of Andrew J. Berryhill. Andrew J. Berryhill, the son of George Franklin Berryhill and his wife, Clementine Berryhill, was born on the 6th day of May, 1901, and died the following November. Both at the time of the birth and at the time of the death of the child,

the original Creek agreement was in force and at no time during his life was he entitled to enrollment. By the Supplemental Agreement, above quoted, he did become entitled to enrollment and an allotment, as he was born prior to May 25, 1901, and was living on that date. On October 8, 1902, his name was placed upon the approved Creek Indian roll. On April 28, 1904, selection of his allotment was made as the allotment of Andrew J. Berryhill, deceased, and on October 10, 1904, patent issued from the Creek Nation to the heirs of Andrew J. Berryhill, deceased. Shulthis, the complainant, asserted title to the land under a departmental oil and gas lease executed to him by George Franklin Berryhill, a Creek citizen of less than full-blood, and Clementine Berryhill, his wife, a non-citizen, in March, 1906, and approved April, 1907, by the Secretary of the Interior. On June 5, 1906, Berryhill and his wife executed to the defendants Edmond and Perry McKay a warranty deed conveying the land in controversy. In October, 1906, the McKays executed an oil and gas lease to one Arthur B. Reece. In the month of August and subsequent to the 8th day thereof, MacDougal secured deeds from the brothers and sisters of Geo. Franklin Berryhill upon the theory that they had inherited the fee in the land as the uncles and aunts of Andrew J. Berryhill. Thereafter and prior to the final approval of the plaintiff's lease, the Kiefer Oil & Gas Co. secured a lease on the land for oil and gas purposes from MacDougal, and also through a series of intermediate leases became the owners of the oil and gas leases executed by the McKays to Reece. These conveyances and leases, other than that executed to the complainant, were executed after the 26th day of April 1906. The two questions involved were whether or not the lands of Andrew J. Berryhill were in the hands of his heirs an ancestral estate or a new acquisition and when said lands became alienable. If an "Ancestral Estate," the father took the fee; if a "New Acquisition" or estate by purchase, the fee vested in the collateral heirs subject to a life estate in favor of the father and mother respectively. Judge Campbell decided the estate to be a "New Acquisition." His conclusion is stated in the following language:

"I, therefore, conclude that the allotment of Andrew J. Berryhill was, in contemplation of law, a new acquisition, and that his father George Franklin Berryhill acquired only a life estate. Having but a life estate, he could not execute

a valid oil and gas lease thereon. A tenant for life of lands containing minerals, oil or gas, cannot open any new mines or wells, or lease the lands to others for this purpose. 16 Cyc. 625; *Marshall v. Mellon*, 179 Pa. 371."

It was insisted on behalf of the intervener that as to the lands in controversy, George Franklin Berryhill was the allottee and that the lands were not alienable. Discussing this subject Judge Campbell uses the following language:

"As applied to the Creek Nation, it has reference to lands inherited under the terms of the original and supplemental agreements. The land in controversy passed by the terms of the supplemental agreement. The act of 1906 and the supplemental agreement must be construed together. We have decided that by the use of the term "descend" in the supplemental agreement it was intended that lands of a member dying before receiving his allotment should, in contemplation of law, descend to his heirs in all respects as though title to the allotment had vested in him before his death. If that be true, then in contemplation of law such lands become inherited lands in the hands of the heirs, and construing the act of 1906, as we must, in connection with the supplemental agreement, the term "inherited lands" must be held to apply as well to lands passing to heirs of members dying before allotment as to lands passing by technical descent from members dying after allotment. I can conceive no reason why any distinction should be made between the two classes of lands referred to. The purpose of imposing restrictions in the first place was to protect a people presumably incompetent to deal with their own lands without some supervision. Congress has seen fit in this act to remove such restrictions from that class of lands termed "inherited land," subject to certain conditions as to full-bloods and minors, presumably considering that such measure of protection as Congress still deems necessary to afford the Indians can be exercised without longer imposing restrictions on this class of lands. But what possible reason could be suggested for continuing the restrictions on lands coming to the heirs as the land in controversy came to the intervener and removing them with reference to lands coming to heirs technically by descent? Certainly none can be suggested. If the act of 1906 stood alone, it might with considerable force, be contended that its terms with reference to this matter are clear, and do not call for construction, and must, therefore, be literally construed. But this act, as we have seen, must be considered together with all other cognate acts. There being no reason for such a distinction, and no such distinction having been intended in

the supplemental agreement, I conclude that the term "inherited lands," as applied to the Creek Nation, applies to all allotments selected by or for deceased members of the tribe, in the hands of their heirs, whether such deceased members died before or after receiving such allotments. It follows that by his deed to the McKays, George Franklin Berryhill, the intervener, divested himself of all his title in the land in controversy.

"Having decided that complainant's lessors had not such interest in the land as enabled them to make a valid oil and gas lease, and that the intervener's deed to the McKays divested him of all his title to the land, the other points raised at the trial become immaterial to a determination of this case."

The entire opinion is well worth a careful reading and thoughtful consideration. The case has been appealed to the Circuit Court of Appeals for the Eighth Circuit, and the judgment of the Trial Court affirmed, but upon a somewhat different conclusion as to the law of descent.

Section 103. Act of April 21, 1904, removing restrictions.

The Act of April 21, 1904, removing restrictions upon the alienation of surplus lands of those not of Indian blood who were adults, had the same application to the lands allotted to the members of the Creek Tribe as it had to those allotted to the members of the Choctaw and Chickasaw Tribes, and what is said in Section 36 may be considered as having been said with reference to the alienation of lands by this class of Creek citizens.

Section 104. Act of March 3, 1903, removing restrictions upon alienation for townsite purposes.

The provisions of the Act of March 3, 1903, premitting alienation for townsite purposes also applied to Creek allotments. (See Section 35).

Section 105. Act of April 26, 1906, extending restrictions upon alienation.

The Act of April 26, 1906, extending restrictions upon the alienation of full-blood allottees is applicable to allotted and inherited lands of the Creeks as well as to the other civilized tribes. The effect of this Act, however, in its application to the lands of the Creeks has been very much limited by the decision of the Supreme Court in what is known as the *Marchie*

Tiger case. This case was styled "*Western Investment Company et al. v. Marchie Tiger*," 96 Pac. 602, decided by the Supreme Court of Oklahoma, and the syllabus is as follows:

"An adult full-blood Creek Indian who, after five years after the approval of the Supplemental Creek Agreement, executed deeds without the approval of the Secretary of the Interior, conveying lands which had been allotted to certain of his relatives who were full-blood Creek Indians, and which had been inherited by him upon the death of such relatives, thereby conveyed a good title to his grantees.

"Act Cong. April 26, 1906, c. 1876, 34 Stat. 145, section 22, entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' does not extend beyond the time provided by section 16 (Act March 3, 1893, c. 209, 27 Stat. 645) of the Supplemental Creek Agreement the restrictions upon the powers of heirs who are full-blood Creek Indians to alienate their inherited lands."

Substantially the same construction had been given this statute by the Department of the Interior in a case arising in the Chickasaw Nation, where departmental approval of a guardian's conveyance of an inherited homestead was sought. Approval was refused upon the ground that there were no restrictions upon the alienation of an inherited homestead, and that it was not the purpose of this Act to impose additional restrictions. (See sec. 206.) The case of *Western Investment Co. v. Tiger* has been appealed to the Supreme Court of the United States.

CHAPTER XX.

DESCENT.

Section 106. Descent and distribution under the original Creek Agreement.

Sections 6, 7 and 28 of the original Creek Agreement seem to provide in language free from doubt for the descent and distribution of the allotted lands of the members of the tribe according to the laws of descent and distribution of the Creek Nation.

As to that class of members of the tribe who died prior to allotment, and for whom allotments were made, Section 28 clearly provides that the entire allotment shall descend according to the law of descent and distribution, of the Creek Nation.

As to the surplus land allotted to a living member the statute is not so clear, but the Supreme Court of the State in the case of *DeGraffenreid v. Iowa Land & Trust Company*, 95 Pac. 624, held that the descent of this class of land was controlled by the Creek law of descent and distribution. That by this construction a uniform law of descent and distribution is applied to all of allotted lands; that such a construction was not inconsistent with the language of the treaty, and viewing it from the standpoint of the members of the tribe who voted upon it, it was undoubtedly contemplated that the lands of the tribe should descend according to the tribal laws. *Irving v. Diamond*, 100 Pac. 557.

Section 107. Descent and distribution under the supplemental agreement.

The law of descent and distribution affecting the allotted lands of the members of the Creek tribe or Nation were materially modified by the Creek Supplemental Agreement above referred to. Section 6 of this agreement reads as follows:

“The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield’s Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation,

male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

On the 27th day of May, 1902, the Indian Appropriation Bill for that year became a law (32 U. S. Stat. 258) and substituted the laws of descent and distribution of Arkansas for those of the Creek Nation, and is as follows:

"And provided further, that the act entitled 'an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' approved March 1, 1901, in so far as it provides for descent and distribution according to the laws of the Creek Nation is hereby repealed and the descent and distribution of lands and money provided for in said act shall be in accordance with the provisions of chapter 49 of Mansfield's Digest of the Statute of Arkansas in force in Indian Territory."

On the same date, however, upon which this bill was approved a joint resolution was passed by Congress enacting that the provisions of the Indian Appropriation bill should become effective only from and after July 1, 1902. Therefore it would seem that notwithstanding the provision of the Indian Appropriation bill that the laws of descent applicable to Creek allottees continued to be the Creek law until the first day of July, 1902, unless the supplemental agreement is to be given effect as of the date it was approved by the president, and in that case the laws of descent and distribution of Arkansas became effective June 30, 1902. The Creek statutes of descent and distribution are found in the laws of Muskogee Nation of 1880 and are as follows:

"Sec. 6. Be it further enacted, That if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property." (Laws of the Muskogee Nation, 1880, p. 132.)

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner." (Laws of Muskogee Nation, 1880, p. 69). (But see same subject in part III.

These statutes have been before the Supreme Court of Oklahoma for construction in two cases. In the case of *DeGraffenreid v. Iowa Land & Trust Company*, supra, it was held that the words "if there are no other heirs" in Section 8 mean if there are no children. In discussing this statute the Supreme Court used the following language:

"But, let that be as it may, we are clearly of the opinion that those words were not used in any technical but in their common sense, and that the word 'heir' or 'heirs' were used in the sense of 'child' or 'children.' 'Child' and 'heir' in common speech are often used as synonymous.

"We are therefore of the opinion that by the first use of the word 'heirs' in section 8, the word 'children' was intended, and that by the use of the word 'other' before 'children' was intended to include grandchildren or the descendants of any child living at the death of the intestate, so that it should read in connection with:

"Sec. 6. Be it further enacted that if any person die without a will, having property and children, the property shall descend to the child or children and their descendants, if any, equally, and if no child or descendants, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the blood of the father, etc. If the estate descended to the intestate on the part of the mother, then to the mother, and if no mother living, then to the brothers and sisters of the blood of the mother."

This case also discusses the question of who is the nearest relation to a deceased party within the meaning of the Creek statute, and concludes that the mother in preference to the brothers and sisters is the nearest relation. To sustain this contention the court quotes from Kent's Commentaries, Vol. 4, p. 395, and *Swasey v. Jaques*, 144 Mass. 135.

It was also held under the original agreement that the non-citizen husband was entitled to inherit in the absence of children an undivided one-half interest in the allotment of his deceased wife and that under the Creek law the fact that he had murdered his wife did not deprive him of the right of inheritance.

In the case of *Ollie Bodle v. J. Blair Shoenfelt*, 97 Pac. 556, in an opinion rendered September 11, 1908, the Supreme Court of the State of Oklahoma reiterated the declaration that a non-citizen husband of a member of the Creek Nation who left surviving her no children was entitled to an undivided one-half of the allotted lands of his deceased wife.

Construing this same section the Supreme Court held in an opinion handed down September 9, 1908, in the case of *Martha Hawkins v. Harry L. Stevens*, 97 Pac. 567, that the non-citizen widow of an allottee of a quarter section of land of the Muskogee Nation, whose husband died in June, 1906, is entitled to dower in his estate and until it is assigned to her is entitled to remain in possession of the home or house together with the farm thereto attached free from all rent.

What is the meaning of "and if there be no person of Creek citizenship to take the descent and distribution of such estate then the inheritance shall go to non-citizen heirs in the order named in said chapter." Does this mean if there are no children or descendants of children that it should go to the general heirs of the deceased in accordance with chapter 49 Mansfield's Digest, or is the phrase "that if there be no person of Creek citizenship to take the descent" to be construed to mean that if there is no person of Creek blood to whom the property may go by descent or otherwise in any event.

The term descent is variously defined, the following cases defining it to be the title whereby a person upon the death of his ancestor acquires the estate of the latter as his heir at law. *Starr v. Hamilton*, 22 Fed. Cas. 1107; *Meadowcroft v. Winnebago County*, 54 N. E. 949; *Bennett v. Hibbert*, 55 N. W. 93; *Barkley v. Cameron*, 25 Tex. 233; *Freeman v. Allen*, 17 Ohio St. 527; *In Re Donahoe's Estate*, 36 Cal. 329; *Brower v. Hunt*, 18 Ohio 311; *Priest v. Cummings*, 20 Wend. 338; *Allen v. Bland*, 33 N. E. 774.

Perhaps it was contemplated by the Creeks that under this provision lands of the members of the Creek tribe should not be inheritable by non-citizen heirs, except in cases where there was no person of Creek citizenship capable of inheriting in any contingency.

Section 108. Effect of reserving the homestead for the benefit of minor children.

Section 7 of the original and 16 of the supplemental agreements reserving the homestead of an allottee for the use and benefit of his minor children born after the 25th day of May, 1901, received construction in the case of *Lynde-Bowman-Barby Co. v. Jonas Brown*, decided by the Supreme Court of Oklahoma September 12, 1908, 97 Pac. 613.

In this case, Julia Brown, a member of the Creek tribe of Indians, died leaving surviving her her husband and one child by previous marriage, there never having been any issue born as a result of the marriage with her surviving husband. It was held under this state of facts that the surviving child, Sam Brown, took by inheritance the entire homestead. The opinion of the case concludes with the following language:

“From the foregoing provisions it is obvious that where there are children surviving the husband has no inheritable interest in the estate of his deceased wife, and as there was no child or children born alive of his marriage with the decedent, he is not entitled to curtesy. Having reached this conclusion, it inevitably follows that Sam Brown is entitled to the same share of his deceased mother’s estate as if she had died intestate, there being no other children, which under the circumstances of this case, would undoubtedly be the whole estate.”

Section 109. Lands inherited from allottee—whether a new acquisition.

It has been the opinion of the writer that the lands of an allottee of the Creek tribe of Indians are upon his death a new acquisition within the meaning of the Arkansas statute of descent and distribution; but the Circuit Court of Appeals for the Eighth Circuit in the case of *Shulthis v. McDougal et al.*, not yet reported, has recently held such lands to be an ancestral estate and not a new acquisition. (See Section 62.)

CHAPTER XXI.

MISCELLANEOUS PROVISIONS.

Section 110. Wills.

In the case of *Lynde-Bowman-Darby Co. v. Brown*, supra, it is held that chapters 49 and 155 of Mansfield's Digest, entitled "Descent and Distribution" and "Wills and Testaments" respectively, as modified by acts of Congress, were in force in the Creek Nation on the 13th day of November, 1905, and that chapter 155 entitled "Wills and Testaments" was put in force in the Indian Territory May 2, 1890 (26 U. S. Stats. at L., 81).

The court further held following the established rule of interpretation that it would observe the construction placed upon the statutes of Arkansas prior to their adoption for the Indian Territory and of the subsequent construction thereof by the Court of Appeals for the Indian Territory while such statutes were in force therein. Discussing this question the court used the following language:

"Applying the principles laid down in the case of *George v. Robb* et al. and the case of *DeGraffenreid v. Iowa Land & Trust Company*, supra, we are led to the conclusion that chapters 49 and 155 of the laws of Arkansas as modified by the acts of Congress were in force in the Creek Nation at the time the descent cast and were applicable to this case. To our minds section 16 of the act of Congress, supra (Creek Supplemental Agreement), modifies the general laws of Arkansas to the extent only that the homestead after the death of the allottee must be set aside for the use of children born to him after May 25, 1901; if there be no children the estate may be willed under the laws of Arkansas."

On April 26, 1906, congress enacted a law entitled "An Act for the final disposition of the affairs of the Five Civilized Tribes, and for other purposes," section 23 of which provides that every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; *provided*, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or chil-

dren of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner.

This statute applies to Creek allottees, and continued to be the law applicable to the subject until the 27th day of July, 1908, when the Act of May 27, 1908, became effective.

Section 111. Mortgages.

In discussing mortgages under the title of "Choctaws and Chickasaws" the conclusion was reached that a mortgage was an alienation, and that wherever alienation was permitted or authorized a mortgage might be lawfully executed.

What was said under this subject in considering the right of Choctaws and Chickasaws to mortgage their allotments is applicable to Creek allottees.

Section 112. Public roads.

By section 10 of the Supplemental Creek Agreement it was provided that "Public Highways or roads three rods in width, being one and a half rods on either side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision; and public highways and roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues and to be paid for by the Creek Nation during that time, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along section lines or elsewhere, such damages during the continuation of the tribal government shall be determined and paid in the same manner."

Section 113. National citizenship; conveyances before allotment; conveyance or encumbrance before removal of restrictions; effect of curative or declarative provision of Act of April 26, 1906; doctrine of relation; dower; curtesy; execution, acknowledgment and registration of conveyances, and conveyances by married women.

The subjects at the head of this section have been fully discussed under like headings in the Chapters devoted to the Choctaws and Chickasaws. What is said therein with reference to

these subjects in the discussion of the same dealing with the Choctaws and Chickasaws is applicable to the Creeks. Reference is made to the discussion under each of these titles, in that part of the book in which the Choctaws and Chickasaws are considered.

Section 113-A. Alienation as affected by the Acts of April 26, 1906, and May 27, 1908.

The provisions of the Acts of April 26, 1906, and May 27, 1908, in so far as either affect restrictions upon alienation are applicable to the Allottees of the Creek Tribe. Those provisions of both the Acts dealing with the right to alienate inherited lands are applicable to members of the Creek Tribe and Freedmen. They are fully discussed in Sections 37 to 48, and what is said in these sections with reference to the provisions of these two Acts is applicable to the Creeks. The same is true with reference to the subjects discussed in Chapters 7, 8, 9, and 10.

CHAPTER XXII.

CHEROKEES.

Section 114. Tribal title.

Numerous treaties were entered into by and between the United States and the Cherokees, one of which bears date of May 6, 1828; and the other of February 4, 1833, each made with the Western Cherokees; and one December 29, 1835, made with the Eastern band of Cherokees, by the terms of which the territory that afterwards became known as the Cherokee Nation was guaranteed to them forever. On the 31st day of December, 1838, pursuant to these treaties, provisions and guarantees, a patent was duly issued to the Cherokee Nation reciting that "The United States have given and granted and by these presents do give and grant unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described. . . . All of the other rights reserved to the United States in and about the articles hereinbefore recited to the extent and in the manner in which said rights are so reserved, and subject also to the condition provided by the act of Congress of the 28th day of May, 1830, referred to in the above recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation become extinct, or abandons the same."

Dissensions having arisen among the different Bands of Cherokees a new treaty was made with the United States on August 6, 1846. By article 1 of this treaty it was provided that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit and a patent shall be issued for the same—; That the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same; *Provided*, always that such lands shall revert to the United States if the Indians become extinct or abandon the same." (9 Stat. 871).

At the close of the civil war the government of the United States claimed that the Cherokees had forfeited whatever rights they had under these treaties by virtue of having espoused the cause of the Confederacy. A new treaty was entered into on the first of July, 1866, section 9 of which is as follows:

"The Cherokee Nation having voluntarily in February, eighteen hundred and sixty-three, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted in accordance with the laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and descendants, shall have all the rights of native Cherokees; *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated." (14 Stat. 799).

Section 115. Citizenship.

Much discussion subsequently arose over the meaning of the term "Members of the Cherokee Tribe" but more particularly with reference to the rights of intermarried citizens, which had its consummation in a decision of the Supreme Court of the United States in what is known as the *Cherokee Intermarriage Cases*, 203 U. S. 76, in which it was held that those whites who intermarried prior to 1875 were members of the tribe in the full sense of the word, and entitled to share in the lands and properties of the tribe, unless they should have subsequent to their marriage with a Cherokee, married a white person, and that any white person who had married a Cherokee subsequent to November 1, 1875, was a member only in a limited sense and not in the sense that he was to share in the properties of the tribe.

Section 9 of the Treaty of 1866, confers all of the rights and benefits of membership in the tribe upon all freedmen and all free colored persons who were in the country at the commencement of the rebellion; and who were then residents thereof or who should return within six months, the language being that they and their descendants should have all the rights of native Cherokees. (14 Stat. 799).

Section 15 of the same treaty provided for the settlement of civilized friendly Indians among the Cherokees, and for the conferring upon such Indians as should abandon their tribal relations and reside among the Cherokees, all the rights and privi-

leges of such, and declaring they might remain in the Cherokee Nation on equal terms in every respect with native citizens. (14 Stat. 803).

In 1867 the Cherokees made an agreement with the Delawares pursuant to the treaty of 1866 whereby the Delawares removed to the Cherokee Nation. This agreement guaranteed to each Delaware, who became incorporated in the Cherokee Nation, when the time came to allot the lands, an allotment of 160 acres.

In 1869 the Shawnees were admitted as members of the Cherokee Nation on equal terms with the native citizens, pursuant to which agreement a large body of the Shawnees removed to and resided in the Cherokee Nation.

During the interim nothing further was done toward accomplishing the proposed result of allotting the lands, as provided for in the Treaty of 1866. White population began to flow into the country, towns were built, farms were placed in a state of cultivation, and the country generally enjoyed an era of progress and development.

Citizenship in the Cherokee Tribe prior to 1896 had been acquired by treaty between the Cherokees and other tribal Indians, by treaty between the United States and the Cherokees and by act of the Cherokee National Council admitting certain persons to citizenship.

The rolls of citizenship of the Cherokees were made up and determined in accordance with the laws referred to in Sections 11, 12, and 13. Although the citizenship affairs of the Cherokees would seem to have been more complex than that of the Choctaws and Chickasaws, yet they have not been the subject of as much litigation as those of the latter mentioned tribe.

The chief litigation over the rights of Cherokee citizenship was finally determined in the case of *Stevens v. The Cherokee Nation*, 174 U. S. 485, where the constitutionality of the citizenship legislation controlling the rights of citizenship in the Cherokee Nation is disposed of and it is not necessary to go into further detail with relation to who is entitled to participate in the allotment of the lands of the Cherokees. No person whose name is not upon the final roll as approved March, 4, 1906, is entitled to an allotment in the Cherokee Nation, except minors born prior to and living on that date who were subsequently added to the roll under the provisions of the Act of April 26, 1906.

The same act makes more definite provisions with reference to the Cherokee freedmen by providing that "the roll of Cherokee freedmen shall include only such persons of African descent either free colored persons or the slaves of Cherokee citizens and their descendants who were actual personal bona fide residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11, 1867, but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commissioner to the Five Civilized Tribes or its successors and has been adjudged entitled to enrollment thereto by the Secretary of the Interior. Perhaps a few names were stricken from the Cherokee rolls by order of the Secretary of the Interior March 4, 1906, and their disposition is substantially the same as that of the Choctaws and Chickasaws stricken from the roll by the same action, the effect of which is discussed in Sections 17 to 19.

Section 116. Allotment.

The whole subject of the allotment of lands to the members of the Cherokee Tribe of Indians is identical with that of the allotment to members of the Choctaw and Chickasaw Tribes as set out in Section 25. The amount of land allotted each member of the Cherokee Tribe being land equal in value to 110 acres of the average allotable lands of the Cherokee Nation, of which land an amount equal in value to 40 acres of average allotable land should constitute the homestead. Provision was made in the act of June 28, 1898, for the allotment of the surface of the lands but nothing was accomplished in the way of allotment under this act. On the 12th day of August, 1902, an agreement entered into by and between the Cherokee Nation and the United States for the allotment of the lands of the Cherokee became effective. This agreement is found in full in Part II hereof and also in the 32 U. S. Statutes at Large, page 716.

Section 117. National citizenship.

All that was said with reference to national citizenship as applied to the Choctaws and Chicksaws is equally applicable to the Cherokees. (Secs. 22 and 23).

CHAPTER XXIII.

RESTRICTIONS UPON ALIENATION.

Section 118. Alienation of inherited homestead.

Section 13 of the Cherokee Agreement provides "that each member of said tribe shall at the time of the selection of his allotment designate as a homestead, out of said allotment, land equal in value to forty acres of the average allotable lands of the Cherokee Nation as near as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of the allotment. Separate certificate shall issue for such homestead. During the time the homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner while so held by him."

This section is so clear as not to need construction. The lands are inalienable during the lifetime of the allottee not exceeding twenty-one years from date of certificate of allotment. Such lands become alienable immediately upon the death of the member of the tribe for the same reason that the Choctaw and Chickasaw homestead becomes alienable upon the death of such Choctaw or Chickasaw allottee. (See Section 28.)

Section 119. Alienation of surplus allotments.

By provision of Section 15 of the Cherokee Agreement all lands allotted to the members of the tribe except such land as is set aside for the individual homestead as therein provided shall be alienable in five years after the issuance of patent. Section 14 contains a provision which perhaps aids in the construction of the act because it provides that lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken or sold, to secure or satisfy any debt or obligation or be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act. Under Section 14 the lands are not to be alienated by the allottee or his heirs before the expiration of five years from August 12, 1902. Under Section 15 such lands are alienable in five years after issuance of patent. A practicable knowledge of the administration of the affairs of the tribes and the necessary delay in issuance of the

patent indicates that a very considerable time might elapse between five years after the ratification of the Cherokee Agreement and the expiration of five years after the issuance of patent. The difference in the construction of these two provisions is that under Section 14 the land may not be alienated until the expiration of five years from ratification of the agreement and under Section 15 they may be alienated in five years after the issuance of patent. One is in the negative and the other in the affirmative.

The use of these two provisions, one in the negative and the other in the affirmative, renders the meaning somewhat obscure and doubtful. The question of when lands allotted under this section become alienable was submitted to the Attorney-General of the United States, and he rendered an opinion thereon under the head of "Cherokee Indian Lands; period of Alienation," 26 Opinions of Attorney-General, 351. His opinion upon this phase of the statute is as follows:

"In regard to your first inquiry, I think the clear and specific statements in section 15 of the act of July 1, 1902, that 'all lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after the issuance of patent,' should be taken as making definite and certain the interpretation to be given the negative expression in the previous section that such lands should not, among other things, 'be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act.' As the purpose of the five-year restriction upon alienation presumably was to keep the allottee in possession of his allotment for that length of time, so that he might acquire a knowledge of its value and uses and be better fitted to dispose of it, such purpose might be impaired and perhaps altogether defeated if the date from which the restrictive period was to commence were held to be that of the ratification of the act, as many members might not have received their allotments until long after the ratification of the act and in some cases not until after the expiration of five years from that time. It will be observed that by Section 13 the time when homesteads were to become alienable was fixed at 'not exceeding twenty-one years from the date of the certification of allotment,' upon the receipt of which certificate by Section 21 of the act the allottee became entitled to be put in possession of his allotment.

"This view, it will be observed, satisfies the well-settled rule 'that every part of a statute must be construed in con-

nection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.' (*Market Co. v. Hoffman*, 101 U. S. 116; Sedgwick on Stat. and Const. Law, 238; Wilberforce's Statute Law, 111.)

The reasoning of the Attorney General is persuasive and entitled to much consideration, but it is doubtful if his conclusions are sustained by a careful analysis of the statute. It may be regarded as thoroughly established that lands allotted to members of any Indian tribe, in the absence of statutes imposing restrictions upon alienation, become alienable immediately upon the completion of allotment. Discussing this subject, the Supreme Court of the United States in the case of *Taylor v. Brown*, 147 U. S. 646, uses the following language:

"The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeit his estate by violating it (1 Prest. Est. 477), and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupillage and entitled to special protection (*Pickering v. Lomax*, 145 U. S. 310; *Felix v. Patrick*, 145 U. S. 317, 330), yet the proviso in question may fairly be held to have been adopted in view of general principles. If, when the patent issued, June 15, 1880, West could have conveyed but for a specific restriction taking effect at the same moment, then that date should be included in the period of five years prescribed. The proviso is that the title shall not be subject to alienation in the various ways described and shall be and remain inalienable for a period of five years from the date of the patent. Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent and for five years after that date, two periods of time, but we are of opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. The limitation on alienation was to be and remain, that is to say, the land was to be on the first day not subject to alienation, and so to remain until the five years had expired."

While it may not be said that the surplus land of a member of the Cherokee Tribe of Indians became alienable on the ratification of the agreement, it would have become alienable in the absence of restrictions upon the selection of the allotment. The only means by which restrictions upon alienation of the surplus

lands of a Cherokee allottee can be extended beyond five years from the date of the ratification of the agreement is by giving to section 15 the same construction as if it read as follows:

“All lands allotted to members of said tribe, except such land as is set aside to each for a homestead, as herein provided, shall be inalienable for five years after issuance of patent.”

To hold the Cherokee surplus alienable at the expiration of five years from the ratification of the agreement would not do violence to the language of either section.

It is doubtful if as much can be said for the construction placed upon this provision by the Attorney-General. The statement in the opinion of the Attorney-General that the provision “that ‘all lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after the issuance of patent,’ should be taken as making definite and certain the interpretation to be given the negative expression in the previous section that such lands should not, among other things, ‘be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this Act’” is hardly sustained by a consideration of these two provisions as a whole. In the first place, there is nothing indefinite and uncertain about the provision that the lands shall not be alienated “before the expiration of five years from the date of the ratification of this Act.” The language is clear, explicit and hardly capable of being misunderstood. While it is probably true that the allotment of lands would not be completed before the expiration of five years from the ratification of the agreement, it was supposed, as was indicated by the reports of the Dawes Commission, that the work of allotment would be completed in less than two years. The disposition has generally been in the Department of the Interior to extend the jurisdiction of that department wherever possible. The Interior Department has frequently invoked the assistance of the Department of Justice to sustain questionable claims of jurisdiction or authority. In the opinion of each of these departments, the apparent necessity for the protection of the Indians has led each to go to the extreme in the construction of statutes supposed to have been enacted for the protection of the Indian or his property.

Some of the difficulties arising upon consideration of these agreements may be overcome by a proper consideration of how the various provisions came to be inserted. Representatives of the United States were anxious to have the members of the Five Civilized Tribes hold their lands in severalty and desirous of imposing long-time restrictions upon alienation in order, as they thought, to protect the Indian against ill advised alienation. The representatives of the various tribes felt that inasmuch as the lands were to be divided in severalty, the allottee should take his land as nearly free from restrictions as possible. Section 14, therefore, may perhaps be considered as representing the affirmative or Government side of the proposition. That is to say, that the lands should be inalienable for a period of five years from the date of the ratification of the agreement. Section 15 was probably inserted at the request of the representatives of the tribe as a guarantee that the lands should become alienable in any event in five years after the issuance of patents. This, no doubt, operated as an assurance to the Indian that whatever other provisions there might be in the treaties with reference to restrictions upon alienation, that the Government would not undertake to interfere with his right to alienate after the expiration of five years from date of patent.

It seems, therefore, that the better view of the result of these two provisions is to treat Section 14 as imposing restrictions upon alienation and Section 15 as guaranteeing to the allottee that at no time after the making of the treaty and final allotment of the lands, while the United States continued in control, would they attempt to restrict the right of free alienation beyond the five years after the issuance of patent.

Section 120. Alienation of lands allotted in name of deceased person, under Section 20.

This section is practically identical with Section 22 of the Choctaw-Chickasaw Supplemental Agreement. It is not land allotted to a member but land allotted *in the name* of a deceased member, title to which vests in his heirs upon selection and approval of the allotment, under the provisions of Chapter 49 of Mansfield's Digest. For a full discussion of the Choctaw-Chickasaw provision, see Section 33. Section 22 of the Act of April 26, 1906, was perhaps intended to relieve whatever uncertainty might have existed with reference to when lands allotted under

this section, as well as under various other provisions of the different provisions became alienable.

The Supreme Court of the State has decided that it was not the purpose of Section 22 of the Act of April 26, 1906, to extend restrictions upon alienation. *Western Investment Company v. Tiger*, 96 Pac. 602.

Section 121. Alienation under Act of April 21, 1904.

Under the act of April 21, 1904, set out in full in section 39, all the restrictions upon alienation by Cherokee allottees who were not minors and who were not members of the tribe by blood were removed as to their surplus lands which thereupon became immediately alienable. (See Sections 36 and 37 and authorities there cited.) Many members of the Cherokee Tribe of Indians by blood also took advantage of that provision of the Act of April 21, 1904, which permitted the Secretary upon investigation to remove restrictions upon their right to alienate their surplus lands. That it was not necessary to wait the issuance of patent in order to make a valid conveyance, see authorities cited to Section 56.

Section 122. Act of March 3, 1903, removing restrictions upon alienation for townsite purposes.

The Act of March 3, 1903, permitting alienation for townsite purposes is applicable to the Cherokees as well as to the Choctaws and Chickasaws. (See Section 35.)

Section 123. Effect of proviso to Section 19 of Act of April 26, 1906, as a declarative or curative statute.

The proviso to Section 19 of the Act of April 26, 1906, declaring in substance that no conveyance by any member of the Five Civilized Tribes theretofore made after the selection of an allotment and after the removal of restrictions upon alienation, should be deemed or held invalid because made before patent issued applies to Cherokee allottees as it does to Choctaw and Chickasaw allottees. The subject is fully discussed under the title of Choctaws and Chickasaws. What is said with reference to the effect of this statute upon conveyances made by Choctaw or Chickasaw allottees is applicable to Cherokee allottees, as well as to inherited lands in the Cherokee Nation. The Act of May 27, 1908, is applicable to Cherokee Allottees. See discussion of the provisions of this Act under the title "Choctaw and Chickasaws."

Section 123a. Involuntary alienation.

Section 14 of the Cherokee Agreement provides that "lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken or sold to secure or satisfy any debt or obligation, or be alienated by allottee or his heirs, before the expiration of five years from the date of the ratification of this Act."

This provision undoubtedly prevents the enforced alienation of the lands allotted prior to the expiration of five years from the ratification of the agreement. Does it prevent the enforced alienation subsequent to that time to satisfy a judgment rendered or debt contracted prior thereto? If it does permit such enforced alienation to satisfy a previous debt, the efficacy of the provision will be very greatly impaired. The provision with reference to the alienation of the homestead is that "During the time said homestead is held by the allottee, the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him." This language is somewhat broader than the language applicable to the surplus and was perhaps meant to prohibit the enforced alienation of the homestead at any time on a debt contracted while the land so designated is occupied as a homestead.

Section 123b. Acts of April 26, 1906 and May 27, 1908, as applicable to Cherokee allotted and inherited lands.

The provisions of both the Acts of April 26, 1906, and May 27, 1908, are applicable to the allotted and inherited lands of the members of the Cherokee Tribe. These Acts have been fully discussed under the titles of "Choctaw and Chickasaws" and "Sales of lands of Minors." What is there said with reference to Choctaw and Chickasaws is equally applicable to the Cherokees.

CHAPTER XXIV.

DESCENT, CURTESY, DOWER, ETC.

Section 124. Descent under Section 20 of Cherokee Agreement.

Section 20 of the Cherokee Agreement is in substantially the same language as Section 22 of the Supplemental Agreement with the Choctaws and Chickasaws. Undoubtedly the law of descent as to the lands selected in the name of a member after his decease is the law of descent as provided in chapter 49 of Mansfield's Digest of Statutes of Arkansas in force in the Indian Territory, which is fully discussed in connection with Section 22 of the Choctaw-Chickasaw Supplemental Agreement. (See Sec. 59).

Section 125. Descent subsequent to the Act of June 28, 1898.

It was provided in Section 26 of the Act of June 28, 1898, that on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the Courts of the United States in the Indian Territory.

It is also provided in Section 28 "that on the first day of July, 1898, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by law in connection with said courts, or to receive any pay for the same; and all civil and criminal causes then pending in such court shall be transferred to the United States Court in said Territory by filing with the clerk of the court the original papers in the suit. *Provided* that this section shall not be in force as to the Choctaw, Chickasaw, and Creek tribe of nations until the first day of October, eighteen hundred and ninety eight."

Apparently the abolishing of the Cherokee courts and the prohibition against enforcing tribal laws in the United States courts, the only forum left, abrogated entirely the law of descent and distribution of the Cherokee Nation and left the matter to be determined by the law of the forum. *Nivens v. Nivens*, 64 S. W. 604, 76 S. W. 114, 113 Fed. 39; *Finley v. Abner*, 69 S. W. 911, 129 Fed. 734.

Section 126. Descent subsequent to April 28, 1904.

Whatever doubt there may have been, if any, as to what law of descent controlled in the transmission of the real estate of the

Cherokees by descent prior to April 28, 1904, the Act of Congress of that date clearly made the statute of descent and distribution then in force in the Indian Territory applicable to both the persons and the estates of members of the Cherokee Tribe and Freedmen. Attention has been called to the peculiarity of these statutes in discussing the laws of descent in force among the Choctaws and Chickasaws.

After November 16, 1907, the laws of descent and distribution of the State of Oklahoma controls the descent of the lands of allottees of the Cherokee tribe of Indians, except as modified by Act of May 27, 1908. (See Section 63).

Section 127. Descent—whether an ancestral estate or a new acquisition.

As to whether the allotment of a deceased Cherokee is an ancestral estate or a new acquisition is determined by the same statute applicable to the lands allotted to the Choctaw and Chickasaw allottees.

For a full discussion of this subject see section sixty-two dealing with the same subject applicable to Choctaw and Chickasaw allottees.

Section 128. Public roads.

By the provision of the Cherokee Agreement public road two rods in width, one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor and all allottees, purchasers and others, take the title to such land subject to this provision.

This relieves the Cherokee public road provision from any controversy as to its validity. The Act of April 26, 1906, with reference to public roads is not applicable to the lands of Cherokee allottees.

Section 129. Execution and delivery of patents.

By sections 58 to 62 of this agreement, provision is made for the execution and delivery of patents to be approved by the Secretary of the Interior which shall operate to carry the interest of the Nation and of the United States in and to the lands and the acceptance of which amounts to a relinquishment of all right, title and interest in and to the lands allotted to other members of the tribe.

Section 130. Curtesy, dower, wills and mortgages.

The subjects of curtesy, dower, wills and mortgages are fully discussed in connection with the Choctaws and Chickasaws, and

what is there said with reference to the law applicable to the Choctaws and Chickasaws is likewise applicable to the Cherokees, except, perhaps, that the laws of Arkansas apply to the Cherokees from the 28th day of June, 1898. That this is true, however, is not entirely clear. The Cherokee courts were abolished on June 28, 1898, and the courts of the United States were prohibited from enforcing the Cherokee laws. Whether the practical effect of this action was to make the Arkansas laws applicable to Cherokees and Cherokee estates, is not wholly free from doubt.

For the effect upon the subject of wills of the Act April 26, 1906 and of May 27, 1908, see Section 69. For the effect on Curtesy and Dower of the extension of the laws of the Territory of Oklahoma over what was formerly Indian Territory, see Sections 64 to 66.

Section 131. Leases.

Under Section 72 of the Cherokee Agreement, Cherokee citizens may after selection rent their allotments for not exceeding one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Leases for a longer period may in each case be made with the approval of the Secretary, and not otherwise.

Leases for mineral purposes may also be made with the approval of the Secretary and not otherwise. So far as mineral leases are concerned there is no limitation as to time or terms, and but the one condition attaches, and that is that such lease before it becomes of any validity whatever must be approved by the Secretary of the Interior. The making of agreements violative of the provisions of Section 72 are condemned and declared void in the following language:

“Any agreement or lease of any kind or character violative of this section shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.”

Independent leases may be made to different persons provided the aggregate period does not exceed the maximum time for which the allottee may lawfully lease his land. *Eldred et al. v. Okmulgee Loan & Trust Co.*, decided by Supreme Court of Oklahoma December 1, 1908, 98 Pac. 929; *Williams et al. v. Williams*, decided by the Supreme Court of Oklahoma, November 3, 1908, 98 Pac. 909; *Whitman v. Lehmer*, decided by the Supreme Court of Oklahoma, November 17, 1908, 98 Pac. 357.

Section 20 of the Act of April 26, 1906, with reference to leases and rental contracts is applicable to Cherokee allottees, and modified the law with reference to leasing by such allottees to the extent indicated in said section, which is more fully discussed in Section 70. What is said as to the effect of Section 20 of said Act in that section may be applied to Cherokee allottees.

For the effect of the Act of May 27, 1908, upon leases in Cherokee Nation, see Section 72.

Section 132. In general.

A number of subjects are more fully discussed in that part of this work relating to the Choctaws and Chickasaws, and what is there said in reference to the removal of restrictions effective thirty days from date, conveyances of real estate and acknowledgments thereof, conveyances by married women, extension of restrictions upon alienation, right to alienate before patent, conveyance of land in adverse possession, the doctrine of relation, and conveyance before allotment, is applicable to the Cherokees, and lands allotted to or in the name of members of the Cherokee Tribe or Nation. In these matters the questions are practically identical, and it is unnecessary to discuss them in dealing with each nation.

Such is true with reference to all of the general provisions of legislation enacted subsequent to the allotment agreement relating to the allottees of the Five Civilized Tribes, and particularly the provisions of the Acts of April 26, 1906, and May 27, 1908.

CHAPTER XXV.

TIMBER AND STONE.

Section 133. Timber and stone; right to dispose of.

The Act of June 28, 1898, entitled, "An Act for the protection of the people of the Indian Territory and for other purposes," constituting Chapter 16, Part II, contains a provision as a proviso of Section 16 thereof, in the following language:

"Provided further that nothing herein contained shall impair the right of any member of the tribe to dispose of any timber contained on his, her or their allotment."

This provision is applicable to the timber upon the allotment of the allottees of all of the Five Civilized Tribes, where no subsequent legislation in conflict therewith has become effective. Subsequent legislation with reference to the Creek allottee is found in the Act of March 1, 1902 (31 U. S. Stat. L. 861), and is as follows:

"If any citizen has selected his allotment he may dispose of any timber thereon, but if he dispose of such timber or any part of same, he shall not thereafter select other lands in lieu thereof and his allotment shall be appraised as if in condition when selected."

This special legislation applicable to the allotment of Creek citizens confers ample authority upon a Creek allottee to dispose of his timber. On the 6th day of June, 1900, the President approved an act entitled: "An act to provide for the use of timber and stone for domestic and industrial purposes in the Indian Territory."

Under the provisions of this act such timber and stone was to be used only in the Indian Territory. This act, however, was applicable only to the lands of the Five Civilized Tribes, and was not applicable to the allotments of members thereof. On the 21st day of January, 1903, the President approved another act entitled "An Act to amend 'An Act to provide for the use of timber and stone for domestic and Industrial purposes in the Indian Territory,'" approved June 6, 1900. The Act as amended reads as follows:

"That the Secretary of the Interior is authorized to prescribe rules and regulations for the procurement of timber and stone for domestic and industrial purposes including the construction, maintenance and repair of railroads and other highways, to be used only in the Indian Territory, or upon any railroad outside of the said Territory which is part of any continuous line of railroad extending into the said Territory, from lands belonging to any of the Five Civilized Tribes, and to fix the full value thereof to be paid therefor, and collect the same for the benefit of said tribes: *Provided, however,* that nothing herein contained shall be construed to prevent allottees from disposing of timber and stone on their allotments, as provided in Section 16 of an act entitled, 'An Act for the protection of the people of the Indian Territory and for other purposes,' approved June 28, 1898, from and after the allotment by the Commission to the Five Civilized Tribes."

Section 2 fixed a penalty for the unlawful cutting or destroying of timber standing upon the lands of either of the Five Civilized Tribes. The proviso to Section 1 is the material part of the act as affecting the right to dispose of timber by the allottee, and is as follows:

"Provided, however, that nothing herein contained shall be construed to prevent allottees to dispose of timber and stone on their allotments as provided in Section 16 of an act entitled, 'An Act for the protection of the people of the Indian Territory and for other purposes,' approved June 28, 1898, from and after allotment by the Commission to the Five Civilized Tribes."

This is apparently a Congressional construction of the proviso to Section 16 of the Act of June 28, 1898, construing the same to permit allottees of the Five Civilized Tribes to dispose of their timber from and after allotment by the Commission to the Five Civilized Tribes, and this is substantially the construction given the same by the Assistant Attorney-General for the Department of the Interior under date of August 8, 1903, in a departmental letter Indian Territory Division No. 5412. This construction has been adhered to by the Department ever since. The Assistant Attorney-General, however, seemed to be of the opinion that a conveyance could not be made until after the issuance of the allotment certificate.

Section 134. Timber and stone; right to sell—Continued.

It will be noted that none of these provisions contain affirmative authority to sell. Considered together it seems reasonably

clear that Congress by these several provisions intended that the members of the Five Civilized Tribes should "from and after the allotment by the Commission" be permitted to sell and convey the timber upon their allotments. While the language appears to be more in recognition of a right than a positive declaration of the same, it is fairly susceptible of the construction authorizing such sale and disposition. If it does not confer upon the allottee the right to sell his timber after he takes his land in allotment, then the provisos to the Act of June 28, 1898, and of January 21, 1903, are each ineffectual for any purpose.

The immense forests of pine and hard wood timber located in the Choctaw Nation have been and are, an attractive field for the investment of those desiring to purchase standing timber. Conveyances are usually taken of the timber for a given price to be removed within a given time. Such conveyances also contain provision for ingress and egress from the lands of the allottee selling the timber, both as to the timber cut on his own land and the timber cut from the lands of others. Large sums of money have been invested in conveyances of this character.

Timber transfers usually partake of the nature of a real estate conveyance and are witnessed, acknowledged and recorded as such. The general rule is that standing timber is a part of the real estate, and title passes when the conveyance is executed in the manner and form required for a conveyance of real estate, and acknowledged as conveyances of real estate are required to be acknowledged. It is believed that the provisions of the law permitting the allottee to alienate his timber does not relieve the purchaser from the necessity of securing a conveyance, executed, acknowledged and recorded as conveyances of real estate are required to be executed, acknowledged and recorded. *Neals Lumber Company v. Hinds*, 101 N. W. 959.

Some controversy has arisen over the construction of timber conveyances of the character of those taken by purchasers of timber from allottees of the Five Civilized Tribes. Does the conveyance of timber to be removed within a given period convey an absolute title to the timber with only the privilege to cut and remove within a given time? Or does it convey only so much timber as shall be cut and removed within the time provided within the conveyance? These are questions that must of necessity depend upon the terms of the particular conveyance under consideration. The general disposition seems to be to hold

an ordinary conveyance of this character to pass title to only such timber as is cut and removed during the time limit contained in the contract. The authorities cited below discuss almost every form of timber conveyance and will no doubt throw much light upon any conveyance that may be under consideration. *Allison v. Wall*, 49 S. E. 831; *McRae v. Stillwell*, 55 L. R. A. 513, and note; *Howard v. Lincoln*, 13 Maine 122; *Pren-tiss v. Rose*, 96 Mich. 83, 55 N. W. 613; *McComber v. Detroit L. & N. Ry. Co.*, 32 L. R. A. 102, 66 N. W. 376; *Saltonstall v. Little*, 90 Pac. 422, 35 Am. Rep. 683; *Reed v. Merryfield*, 10 Metcalf 55; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Clark v. Guest*, 54 Ohio State 298, 43 N. E. 862; *Haskell v. Ayers*, 36 Mich. 93; *Strasson v. Montgomery*, 32 Wis. 52; *King v. Merriam*, 38 Minn. 47, 35 N. W. 570; *McIntyre v. Bernard*, 1 Sanford's Chancery 52; *Pease v. Gibson*, 6 Maine 85; *Putney v. Day*, 6 N. H. 430, 23 Am. Dec. 470; *Broussard v. Verrett*, 43 L. A. Ann. 929, 9 So. 905; *Webber v. Proctor*, 89 Maine 404, 36 Atl. 631; *Richard v. Tozer*, 27 Mich. 451; *Mormon v. Bowen*, 53 Mich. 533; *Martin v. Gilson*, 37 Wis. 36; *Sanders v. Clark*, 22 Ia. 275; *Lachlachan v. Miller*, 16 Ky. Law Rep. 55; *Atkins v. Huff*, 52 S. E. 773, 3 L. R. A. N. S. 649; *Bunch v. Elizabeth City Lbr. Co.*, 134 N. C. 116, 46 N. E. 24; *Jutvine v. Goodrich*, 35 Vt. 19; *Utleigh v. Wilcox Lbr. Co.*, 26 N. W. 488; *Wasey v. Mahoney*, 20 N. W. 901; *Mee v. Benedict*, 57 N. W. 175, 22 L. R. A. 641; *Denness & Simmons Lbr. Co. v. Corey*, 140 N. C. 462, 6 L. R. A. N. S. 648; *Neals Lbr. Co. v. Hinds*, 101 N. W. 959; *Alexander v. Bauer*, 102 N. W. 387; *Null v. Elliott*, 43 S. E. 173; *Monds v. Lbr. Co.*, 42 S. E. 334; *Johnson v. Truett*, 50 S. E. 135; *Irions v. Webb*, 41 N. J. Law 203, 32 Am. Rep. 193; *Carson v. Three States Lbr. Co.*, 69 S. W. 320.

CHAPTER XXVI.

TITLE TO TOWN LOTS.

Section 135. Title to town lots and the manner of acquiring and perfecting the same.

For many years prior to the beginning of the allotment of the lands of the Five Civilized Tribes, and before any provision had been made for procuring titles to town lots, the white people who were not members of either of the Tribes congregated in communities, surveyed, and laid out cities and towns, erected residences, business houses, school houses, and other public buildings and improvements.

These towns were laid out, and the buildings constructed by permission of some citizen or member of the tribe, and usually under a rental or lease contract. At the time of the making of agreements for the allotment of the lands in severalty to the members of the Five Civilized Tribes, there were hundreds of villages and towns, and a number of cities within the domain of the Five Civilized Tribes, representing investments of millions of dollars. These improvements were all erected upon Indian lands, and without any adequate legal protection. The money was thus expended, relying upon the fairness of the Indian, and the disposition of the government to protect those who expended their money and devoted their time and energy to the development of national resources.

In the Choctaw, Chickasaw, Creek, and Cherokee agreements provision was made for the laying out of townsites and the acquiring of title to town lots. The provisions, though differing in detail, were based upon substantially the same conditions. Under the provisions of all of these agreements the person who owned the improvements on a town lot was given a preference right to purchase the same at a certain per cent. of the appraised value. The lots were appraised by a commission, one member of whom was usually selected by the President of the United States, and the other by the principal Chief or Governor of the Tribe in which the town or city was located. Provision was made for calling in a third member of the commission if the two thus selected should fail to agree. These commissions determined

the value of the lots and who owned the improvements thereon. They also determined, subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, who was entitled to purchase a given lot. Under the majority of agreements it was required that to entitle a purchaser to purchase at less than the appraised value he should be the owner of permanent, substantial, and valuable improvements located upon the lot. The agreements usually specifically excluded fences, tillage, and temporary improvements. The commissions were most liberal to the owners of improvements in determining what constituted permanent improvements.

If there was more than one claimant to the right to purchase a lot, the townsite commission heard the claim of such contesting claimants, and recommended to the Secretary of the Interior which of the claimants was in their judgment entitled to be awarded the preference right to purchase. The action of the Secretary upon the question of the preference right to purchase was made final. The courts have, however, held in construing the provisions of some of these agreements that the Secretary's action in determining who should have the preference right to purchase was subject to the same investigation and control by the courts as is the action of the Secretary in dealing with public lands generally.

Practically all controversies, if not all, involving the right to purchase town lots are settled, and patents have been issued directly to the persons awarded the preference right to purchase. Such patents in the Choctaw and Chickasaw Nations are signed by the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation. In the Creek and Cherokee Nations the patents are signed by the Principal Chief. Payment to the Tribes for lots so purchased was made in installments, and no patents issued until final payment had been made.

The titles to city and town lots in the Five Civilized Tribes are much less complicated, and much freer from controversy than in the older States. There have been, comparatively speaking, but few transfers that could be made the subject of controversy. It may be truthfully said that titles to town lots in the territory of what was formerly the Choctaw, Chickasaw, Creek and Seminole Nations are more perfect, less complicated, and less open to question than in any of the older States of the Union.

The Seminoles were much less liberal in the matter of the location of town lots than were the Choctaws, Chickasaws, Creeks, and Cherokees. They undertook to limit the townsites in the Seminole Nation to one—that of Wewoka. Provision was made for this in an Act approved by the Principal Chief on the 23rd day of April, 1907. This Act is published as a part of Part II hereof. The authority of the nation to permit the sale of its town lots to citizens of the United States, except upon the consent and approval of the United States, is doubted.

Section 136. Title to town lots and manner of acquiring and perfecting same.—Continued.

It was apparently contemplated by the provisions in the various agreements for the acquiring of title to lots in cities and towns to confer that right upon the actual owner of the improvements upon such lots. Substantially all of the lots in the cities and towns in the Indian Territory on June 28, 1898, and on the subsequent dates on which the agreements between the United States and various Tribes became effective, were occupied by non-citizens as tenants of the members of the various tribes. The lots in many instances had become extremely valuable. The non-citizen tenant had rented the lot occupied by him for a small annual rental and had constructed valuable improvements thereon. However, in many cases the Indian landlord had reserved the right to acquire such improvements upon the payment of the reasonable value thereof. Such a contract was involved in the case of *Fraer v. Washington*, 125 Fed. 280, and it was there held that the contract constituted the Indian landlord the owner of the improvements and vested in the tenant only the right to continue in possession until he had been tendered the value of such improvements. While jurisdiction is vested in the various townsite commissions, under the supervision of the Secretary of the Interior, to determine who is entitled in case of contest to acquire a given lot, the courts have recognized the right to have the action of such townsite commission reviewed under the conditions that would justify review of the action of the the Secretary of the Interior in deciding contests relating to public lands.

The cases in which this right exists is pointed out by Mr. Justice Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in the case of *James et al. v. Germania Iron Co.*, 107 Fed. 600-1, as follows:

“ He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of the two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him and to give it to another. (*Bogan v. Mortgage Co.*, 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S., App. 346, 350; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; *U. S. v. Northern Pac. R. R. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. Ed. 462; *Barnard v. Ashley's Heirs*, 18 How. 43, 15 L. Ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. Ed. 801; *Lytle v. Arkansas*, 22 How. 193, 16 L. Ed. 306, *Lindsay v. Hawes*, 2 Black, 554, 562, 17 L. Ed. 265; *Johnson v. Towsley*, 13 Wall. 72, 85, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 538, 24 L. Ed. 848; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (*Gonzales v. French*, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. Ed. 458). If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud; if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing. *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 870, 882, 37 C. C. A., 290, 296, 308; *U. S. v. Atherton*, 102 U. S. 372, 374, 26 L. Ed. 213; *U. S. v. Budd*, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. Ed. 384; *U. S. v. McIntosh*, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; *U. S. v. Throckmorton*, 98 U. S. 61, 66, 68, 25 L. Ed. 93; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. Ed. 800; *Steele v. Refining Co.*, 106 U. S. 447, 451, 1 Sup. Ct. 289, 27 L. Ed. 226; *French v. Fyan*, 93 U. S. 169, 172, 23 L. Ed. 812; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. Ed. 346; *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. Ed. 1063; *Barden v. Railroad*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992.”

The most recent cases considering the townsite provisions of any one of the agreements, is that of *W. O. Whitney Lumber & Grain Co. v. Crabtree*, 166 Fed. 738.

It is only in rare instances that jurisdiction of the courts will be invoked to reverse the final award of the Secretary of the Interior.

The townsite provision of the Choctaw and Chickasaw Agreements award a preference right to purchase to the actual owner of the improvements. In the Creek and Cherokee Nations, the right to possession is recognized as well as the ownership of improvements. This has somewhat complicated the situation where the right of possession is in the Indian landlord and the ownership of the improvements in the tenant. See also *Brennan v. Shanks*, 103 Pac. 705.

CHAPTER XXVII.

MISCELLANEOUS.

Section 137. Homesteads.

Under the agreements made between the United States and each of the Five Civilized Tribes, and under the laws of the United States applicable to the allottees of each of the tribes, a homestead is reserved out of each allotment, and is made inalienable for a long period of years. This may be termed a homestead by reservation.

This homestead right is wholly independent of occupancy. It may, and most frequently does exist as to land never in fact occupied as a homestead. This homestead is wholly a creature of the law arising from the agreements between the United States and the various tribes, and the laws enacted pursuant thereto. It is really not a homestead within the accepted meaning of that term. It is an arbitrary application of the term homestead to a certain part of an allotment which the allottee is prohibited from alienating for a long period of time.

In the case of the Choctaw and Chickasaw freedmen the term is applied to the entire allotment which is made a homestead by an Act of Congress; although it may not be occupied as a homestead. It cannot be alienated by the allottee until the expiration of the restrictions upon alienation as fixed by the agreements or Acts of Congress in reference thereto. This homestead right, or, more strictly speaking, this prohibition against alienation of land designated as a homestead, was removed as to all persons not of Indian blood, and to all persons of less than half Indian blood by the Act of May 27, 1908.

This homestead, which, for the purpose of this discussion, will be termed the "reserved homestead," may become an actual homestead by occupancy under the homestead laws of Oklahoma. In such case it is protected not only by the agreements with the tribes and the laws of the United States, but also by the homestead laws of the State of Oklahoma. When such is the case, in order to pass a perfect title the restrictions upon alienation must have expired, or been removed, and both the husband and wife must join in the conveyance. If the homestead is such by reservation only, the husband or wife either, whichever happens to

be the owner, may convey without the other joining; likewise that part of the allotment known as the surplus may become a homestead by occupancy under the Constitution and laws of the State, and, in such case, in order to pass a perfect title, both husband and wife must join in the conveyance.

In many instances it requires a careful scrutiny of the abstract to determine to which class of homesteads the land designated as a homestead therein belongs. The validity of the conveyance frequently depends upon the question of whether or not the homestead is such by reservation or by occupancy. The law permitting the alienation of each class is different. The persons required to join in each case are different. It is well, therefore, to always carefully examine the abstract, to determine to which particular class a given homestead belongs.

Section 138. The abstract.

There are many features of an abstract peculiar to the lands of the Five Civilized Tribes. The right to alienate depends upon not only numerous statutes and agreements, but upon the age and quantum of Indian blood as shown by departmental record, and upon the varying laws of descent and distribution of the various tribes in force at different times. The first question to consider always is whether or not title has been secured from the tribe. It is usually evidenced by a certificate of allotment, or patent. Sometimes the certificate of allotment has become lost without having been recorded, and there is offered in lieu thereof a certificate from the Commission of the Five Civilized Tribes that the land has been selected in allotment by the proposed grantor, that no contest has been filed, and that the contest period has expired. While such a certificate has not the full force and effect of an allotment certificate, it has been accepted in many instances, and, where followed by an allotment certificate or patent, is without objection. Occasionally, however, an allottee undertakes to surrender his allotment, and selects an allotment elsewhere. If the certificate is not finally issued it may be a serious question as to how far a purchaser is protected as against the surrender and cancellation of the allotment. The purchaser is not permitted to appear and contest the offer to surrender, and have cancelled such allotment.

Ordinarily, consulting the rolls prepared under the supervision of the Secretary of the Interior, it is possible to determine the quantum of Indian blood and the age so far as it may affect

the right to alienate under the Act of May 27, 1898. In preparing the rolls, the age of enrolled members or freedmen of the Choctaw and Chickasaw Nation was calculated to September 25, 1902. The ages of members and freedmen of the other tribes were calculated to different dates, the date to which the age was calculated appearing upon any enrollment certificate furnished by the Commission. It also appears, as to most of the tribes, in the printed rolls prepared under the supervision of the Government. To summarize, where the right to alienate existed prior to April 26, 1906, the age of the grantor must be determined in the ordinary way.

Where the right to alienate is authorized and exercised under the Act of April 26, 1906, or May 27, 1908, the statute makes the rolls conclusive as to quantum of Indian blood, and under Act May 27, 1908 as to age. (See Section 207.)

To what extent the rolls are permissible as evidence, in cases where they are not made conclusive, as to age or quantum of Indian blood, does not seem to have been considered or determined by any court of last resort.

It is, however, in dealing with the laws of descent and distribution that the most serious difficulties arise. Changes in these laws have been frequent, and it often happens that there are two or more laws of descent in force in the same tribe at one time. It sometimes occurs that part of the estate of a deceased member of a tribe will descend in accordance with one law and part in accordance with another. The crudity of some of the statutes, and the want of authoritative construction makes a solution most difficult. In making the various agreements between the tribes and the United States, and in the enactment of laws by Congress applicable thereto, such little regard was had for existing laws and existing conditions that independent of the tribal statutes there is much doubt and uncertainty. Out of these two main questions, the right to alienate and the laws of descent, have arisen a myriad of questions of more or less importance. Some of these, for the present at least, are largely theoretical, but many are of practical and vital importance to every would-be purchaser. Many of these questions have been discussed in these pages, many yet not thought of will in the future invade the field of legal controversy.

Perhaps these suggestions will serve some useful purpose in calling to the attention of the lawyer who examines abstracts of title to the lands of allottees of either of the Five Civilized Tribes the necessity of a careful consideration of all the agreements and laws affecting the right to alienate at the time the original Indian grantor passed the title, and of the laws of descent under which an Indian grantor inherited any particular tract or parcel of land which he is desirous of conveying.

CHAPTER XXVIII.

TAXATION.

Section 139. Taxation as affected by Act of May 27, 1908.

Section 4 of the act is as follows:

“That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law.”

The members of the tribe have organized to test the validity of the first provision of Section 4, that is the right to impose the burden of taxation upon the allotments before alienation where the land would not under the terms of the various agreements be taxable. No person who purchases these lands would be in a position to assail this provision. The sale by the allottee would be an assent to the terms, provisions and conditions of the Act permitting alienation.

Section 140. Graduated land tax.

Ordinarily the subject of taxation is entitled to but little consideration in the discussion of land titles; however, at least one of the tax laws of the State of Oklahoma so materially and vitally affects the beneficial use of real estate that it is deemed advisable to call attention to it.

The authority to tax the lands of the allottees of the Five Civilized Tribes must be ascertained from the terms and provisions of the agreements entered into by the various tribes and the United States, and the legislation of Congress subsequently enacted relating either directly or indirectly to the subject of taxation. The agreements and Congressional Acts, however, determine only when such land becomes subject to taxation. Once subject to taxation, the character and extent of the taxes to be levied are to be determined solely by the legislative authority of the State of Oklahoma, provided, of course, that such legislation is kept within Constitutional limits.

In the exercise of this right, the Governor of the State of Oklahoma approved on the 26th day of May, 1908, an Act entitled "An Act to provide for a graduated tax on land holdings in excess of six hundred and forty acres of average taxable land, and a graduated tax upon the income, rents, and profits of lands, held by lease or rental contract in excess of six hundred and forty acres, and providing procedure for collection thereof."

The Act is applicable to all persons, natural or artificial, including corporations, "Owning or holding land in fee or with title less than fee-simple, or by rent or lease contract."

Section 4 of the Act contains the following provision, however:

"The provisions of this Act shall not apply to such corporations authorized by the Constitution of this State to own land, upon land so authorized to be owned or held by the Constitution."

The tax upon the excess of land above fixed amounts is as follows: On the excess above six hundred and forty to twelve hundred and eighty acres, one-fourth of one per centum; on the excess above twelve hundred and eighty acres and not exceeding three thousand acres, one per centum; on the excess above three thousand acres and not exceeding five thousand acres, two per centum; on the excess above five thousand acres and not exceeding ten thousand acres five per centum; on the excess above ten thousand and acres and not exceeding twenty-five thousand acres, ten per centum. "Such excess in each case to be levied and collected in addition to the regular uniform ad valorem tax levied by law, and such graduated excess shall be calculated upon the basis fixed for taxation upon such land, exclusive of the improvements thereon, until otherwise provided by law; twenty dollars per acre shall be deemed and construed as the average value of Oklahoma land, and any number of acres, or any fraction of an acre, of the taxable value of twenty dollars shall be treated for the purpose of this Act as one acre of average land, *provided*, however, that three hundred and twenty acres of land shall be exempt from this tax, regardless of the value thereof."

This is perhaps the first American experiment in what is known as progressive land taxation. The Constitution of the State of Oklahoma, Articles 10, Section 12, authorizes the Legislature to levy "graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession

taxes." It nowhere authorizes a levy of a graduated land tax. All the provisions in the Constitution of the State relating to the subject of taxation seems to contemplate that property shall bear the burdens of government in proportion to its value. It is probable that this law is violative of the provisions of the State Constitution, and denies to the owner of the property so taxed equal protection of the laws guaranteed by the Constitution of the United States.

Under this statute a man may own property in a city or town of unlimited value without becoming subject to the provisions of the law, but if he owns country lands of a much less value the tax attaches and the burden increases as the holdings increase, but not strictly in proportion thereto.

Section 141. Graduated land income tax.

The same Act also makes provision for a graduated tax upon "The incomes, rents, and profits accruing to the lessee from such land in excess of six hundred and forty acres."

On the income from six hundred and forty acres to twelve hundred and eighty acres the extra tax is fixed at one per centum upon all of the income, rents, and profits accruing therefrom, and on the excess above twelve hundred and eighty acres and not exceeding twenty-five hundred acres the additional tax is three per centum of the income, rents, and profits; and on the excess of twenty-five hundred acres, and not exceeding five thousand acres, the extra tax is five per centum of the income, and on the excess of five thousand acres and not exceeding ten thousand the excess is ten per centum of the income, rents, and profits."

Perhaps the use of the word "lessee" in the sentence "Incomes, rents, and profits accruing to the lessee" is an error, and the word lessor was intended to be used. It would be a very peculiar standard to fix as a basis for an income tax to say that the owner of the land should pay upon the basis of the profits of his lessee. The basing of the tax upon the income of the lessee may nullify the entire provision. It fixes an absolutely erroneous basis. It requires the tax to be paid not upon the taxpayer's income, but on some one's else income.

CHAPTER XXIX.

CORPORATE AND ALIEN OWNERSHIP OF LAND.

Section 142. Corporate ownership of land.

Section 2 of Article 22 of the Constitution is as follows:

“No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading, dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto; nor shall any corporation doing business in this State buy, acquire, trade or deal in real estate for any purpose except such as may be located in such towns and cities and as additions to such towns and cities, and further except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed, nor shall any corporation be created or licensed to do business in this State for the purpose of acting as agent in buying and selling land: *Provided, however,* That corporations shall not be precluded from taking mortgages on real estate to secure loans or debts or from acquiring title thereto upon foreclosure of such mortgages or in the collection of debts conditioned that such corporation or corporations shall not hold such real estate for a longer period than seven years after acquiring such title: *And provided further,* That this section shall not apply to trust companies, taking only the naked title to real estate in this State as a trustee, to be held solely as security for the indebtedness pursuant to such trust: *And Provided Further,* that no public service corporations shall hold any land, or the title thereof, in any way whatever in this State, except as the same shall be necessary for the transaction and operation of its business as such public service corporation.”

On the 26th day of May, 1908, the Governor approved an Act entitled “An Act prohibiting corporate ownership of real estate and providing the manner in which such real estate should be sold.” (Session Laws of 1907-8, page 196.) Section 1 of this Law is practically a re-enactment in the language of the Constitution.

Section 2 requires every corporation which owns real estate outside of corporate limits of cities and towns, unless the same shall be necessary and proper for the carrying on of its business, to sell and dispose of the same within the period of seven

years, permitting, however corporations to acquire title to real estate upon foreclosure of mortgages or in collection of debts, but likewise requiring that such land shall be disposed of within seven years from the date upon which such title is acquired. In case of a failure to do so, the county attorney is directed to institute proceedings to have a judgment of escheat rendered in favor of the State.

By Section 3 the duty is imposed upon the Corporation within the first twenty days of January in each year to file in the office of the Corporation Commission a list of all lands not used by it in the necessary carrying on of its business, together with the date upon which such real estate was acquired, the amount of the claims of such corporation in the satisfaction of which the same was acquired, and that a duplicate thereof shall be filed and recorded in the office of register of deeds of the county in which such real estate is located; both the original and duplicate are required to be verified by the president, secretary or treasurer of the corporation.

By Section 4 of this Act it is provided that the same shall apply to all corporations doing business in this State, whether formed under the laws of this State, under laws previously in force in any part thereof, or under the laws of any other State, territory, or government, but no foreign corporation shall be relieved of compliance with the requirements made of domestic corporations by the provision of this Act, or any law of this State.

A serious question may arise as to the constitutionality of this Act when applied to the corporations existing prior to Statehood and which, under the law, might lawfully acquire and hold real estate. An interesting discussion of the subject of the rights of corporations existing prior to Statehood is found in a decision of the Supreme Court of Oklahoma in a case involving the constitutionality of the Act providing for the creation of a fund to guarantee the depositors of banks against loss. The case is styled *Noble State Bank v. State Banking Board*, not yet reported.

Section 143. Alien ownership of lands.

It is provided by Section 1 of Article 22 of the Constitution of the State of Oklahoma that,

“No alien or person who is not a citizen of the United States, shall acquire title to or own land in this State, and

the Legislature shall enact laws whereby all persons not citizens of the United States, and their heirs, who may hereafter acquire real estate in this State by devise, descent or otherwise, shall dispose of the same within five years upon the conditions of escheat or forfeiture to the State: *Provided* this shall not apply to Indians born within the United States, nor to aliens or persons not citizens of the United States who may become bona fide residents of this State,

"And Provided Further, That this section shall not apply to the lands now owned by aliens in this State."

Pursuant to the above provision of the Constitution, the Legislature passed an act entitled "An Act to Prohibit Alien Ownership of Lands." [Session Laws of 1907-8, Chap. 49, pp. 481-2.) This Act elaborates the provisions of the Constitution and provides the procedure for securing a judgment escheating the lands so unlawfully held to the State. The procedure so provided is an action by the Attorney-General of the State or county attorney, setting forth the facts of the unlawful holding and asking a judgment declaring that such lands be escheated to the State. The issues are made up and tried as they are in any other character of case pending in the district court. If the trial should result in a judgment of escheat, the party aggrieved may appeal from the judgment so rendered to the Supreme Court of the State in the manner that appeals are prosecuted in other cases. The law contemplates a fair and judicial determination of the question of whether the lands are held in violation of the Constitution and the statute, and if so held, authorizes a judgment declaring the same escheated to the State.

CHAPTER XXX.

JURISDICTION OF FEDERAL COURTS OVER; SUITS BROUGHT BY THE UNITED STATES TO CANCEL CONVEYANCES MADE BY ALLOTTEES OF THE FIVE CIV- ILIZED TRIBES.

Section 144. Federal suits to cancel conveyances by allottees.

There are pending in the Circuit Court of the United States for the Eastern District of Oklahoma about two hundred suits, involving about twenty thousand defendants, instituted to recover more than a million acres of land. These suits are instituted by the United States upon the recommendation of the Secretary of the Interior upon the assumption that the lands sought to be recovered were conveyed in violation of the provisions of the various agreements imposing restrictions upon alienation.

The bill of complaint alleges as a basis for joining several hundred defendants in each of the suits that the defendants are pursuing a common course in securing conveyances of like character from the allottees in violation of like statutes prohibiting alienation, and that it is necessary to join such defendants in order to avoid a multiplicity of suits. The authority of the United States to bring the suits is based upon the supposed guardianship over the persons and the property of the allottees and upon the duty resting upon the United States to enforce the restrictions imposed by the agreements and the laws of the United States upon the alienation of lands allotted to the members of the Five Civilized Tribes.

Jurisdiction in the Circuit Court of the United States is asserted by virtue of the provisions of the Judiciary Act conferring jurisdiction upon the Circuit Courts of the United States over any controversy "in which the United States are plaintiffs or petitioners." It is insisted that the case of *United States v. Sayward*, 160 U. S. 493; *In Re Heff*, 197 U. S. 488; *In re Debbs*, 158 U. S. 564; *United States v. San Jacinto Tin Co.*, 125 U. S. 73; *United States v. Bell Telephone Co.*, 128 U. S. 315; *Cherokee Nation v. Hitchcock*, 187 U. S. 308, and *United States v. Rickert*,

188 U. S. 432, sustain the jurisdiction of the Circuit Court of the United States and the capacity of the United States to maintain said suits.

It is also insisted that the authority of the United States to maintain these suits is recognized by section 6 of the Act of May 27, 1908. The defendants in each instance demurred to the bill upon the following grounds:

That the court is without jurisdiction.

That the bill of complaint fails to show such interest in the plaintiffs as would entitle them to maintain these suits.

Because the plaintiffs have no capacity to maintain these suits.

Because the bill of complaint is devoid of equity.

Because by said bill it is sought to quiet title to land to which the plaintiffs are not now and has never been in possession.

Because there is a defect of parties to these suits.

Because there is a misjoinder of alleged causes of action in this, that the alleged causes of action against each defendant is improperly joined with that of numerous other defendants, because there is no joint interest as between the defendants, nor any joint occupation of the property, nor any other reason that would authorize a joint suit, alleged.

Because said bill of complaint is multifarious.

Because said bill of complaint does not disclose such a state of facts as would entitle the plaintiff to recover in any event.

The contention of the defendants in support of their demurrers is well summarized in a brief filed by the writer in support of a number of these defendants, and this brief, with some slight additions, the result of the oral argument before the Circuit Court on said demurrers, is, as to the questions of jurisdiction and the capacity of the United States to maintain the suits, as follows:

Section 145. The circuit court of the United States is without jurisdiction.

The first question to be considered is: Has this court jurisdiction to entertain these suits and grant the relief prayed for, or, in other words, has the United States the right to invoke the jurisdiction of a Circuit Court of the United States upon the sole ground that they are parties plaintiff, without regard to the

residence of the other parties, or the amount in controversy? The case of *United States v. Sayward*, 160 U. S. 493, is relied upon as authority to support the jurisdiction of this court. That was a suit instituted by the United States to recover the sum of \$1470 as damages alleged to have been sustained in consequence of the unlawful cutting and removal of certain trees from the unoccupied lands of the United States; and it was there held that under the first section of the Judiciary Act, as amended in 1888, the Circuit Courts of the United States have jurisdiction of any controversy in which the United States "are plaintiffs or petitioners." It will be noted that that was a suit by the United States for a conversion of the property of the United States. The question at bar is an entirely different one. The United States brings this suit not because of any debt owing to the United States, or any wrong committed against the United States, but by reason of wrongs alleged to have been committed against certain citizens of the United States in the purchase from such citizens of certain lands which, it is insisted by the United States such citizens could not lawfully sell and convey to others.

The United States is not the real party in interest. The real party in interest, if a cause of action in fact exists, is the party who was induced to make the conveyance and who has the right to recover the property notwithstanding said conveyance. In other words, the United States, in order to invoke the jurisdiction of the Circuit Court without regard to the amount in controversy, must be the real party in interest, and the relief sought must be for wrongs committed against the United States, or for the breach of obligations made to or for the benefit of the United States. Jurisdiction cannot be conferred upon the Circuit Court by the bringing of an action for the benefit of some one else in the name of the United States. This question has been frequently involved where one state of the Union has undertaken to bring suit against another state of the Union to enforce an obligation or to protect the right of a citizen of the State bringing the suit. In the case of *Louisiana v. Texas*, 176 U. S. 16, Mr. Chief Justice Fuller, speaking for the court, used the following language:

"In order then to maintain jurisdiction of this bill of complaint against the State of Texas, *it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Tex-*

as, and not a controversy in the vindication of grievances of particular individuals." (Italics ours).

Mr. Justice Harlan, in his concurring opinion, pp. 24-25, used the following language:

"The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States,' and to controversies 'between a State and citizens of another State,' and the word 'party' in the clause declaring that this court shall have original jurisdiction of all cases 'in which a State shall be party' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court. If this were not so, we were wrong in *New Hampshire v. Louisiana*, 108 U. S. 76 in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this court against the debtor State.

It will be noted that the language is practically identical with that conferring jurisdiction upon Circuit Courts of the United States in all cases in which the United States "are plaintiffs or petitioners," in the last instance the jurisdiction arising in cases in which a State shall be a party.

In the *Virginia Coupon Cases*, 114 U. S. 270, 287, the following language is used:

"It is also true that the question whether a suit is within the prohibition of the eleventh Amendment is not always determined by reference to the nominal parties on the record. . . . Accordingly it was held in *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, that although the judicial power of the United States extends to 'controversies between two or more states,' it did not embrace a suit in which, although nominally between two states, the plaintiff State had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names."

In *Ex Parte Ayers*, 123 U. S. 489, Mr. Justice Matthews, in speaking for the court, said:

“So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this court; but, on an examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof who had transferred their claims to the State for the purposes of suit. It was accordingly unanimously held by this court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit.” See also *Wisconsin v. Pelican Insurance Co.* 127 U. S. 289.

In the case of *United States v. Beebe*, 127 U. S. 338, suit was instituted in the Circuit Court of the United States for the Eastern District of Arkansas by the United States to cancel a patent issued to Roswell Beebe to certain lands. A demurrer was interposed to this bill which was sustained and an appeal taken to the Supreme Court of the United States, and the judgment of the Circuit Court was affirmed. Quoting the cases above cited and applying the same test to the jurisdiction of the Circuit Court of the United States as had been applied to the right to maintain a suit by or against a State as a party, Mr. Justice Lamar used the following language:

“Applying these principles to this case, an inspection of the record shows that the government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to lose if the relief is denied. The bill itself was filed in the name of the United States and signed by the Attorney-General on the petition of private individuals, and the right asserted is a private right, which might have been asserted without the intervention of the United States at all.” See also *Browne et al. v. Strode*, 5 Cranch 303; *Mc Nutt v. Bland*, 2 Howard 10; *State of Maryland, etc., v. Baldwin*, 112 U. S. 490; *Stewart v. Baltimore & Ohio Ry. Co.*, 168 U. S. 445; also the case of *United States Fidelity & Guaranty Co. v. United States*, 204 U. S. 349.

While in the last-mentioned case, the jurisdiction of the Circuit Court was sustained, the language used evidences the fact that if the court had been of the opinion that the United States

was not the real party in interest, the jurisdiction would not have been sustained. We quote as follows from the language of Mr. Justice Harlan, who rendered the opinion :

“We repeat the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the character to make prompt payment for labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect to that matter. The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of the opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor for the construction of public works, that it is not an unreasonable construction of the words in the judiciary act of 1887, 1888 ‘or in which controversy the United States are plaintiffs or petitioners,’ to hold that the United States is a real, and not a mere nominal, plaintiff in the present action, and therefore that the circuit court had jurisdiction.”

The case of *Kansas v. United States*, 204 U. S. 331, involved the jurisdiction of the Supreme Court of the United States over a bill of complaint by the State of Kansas as trustee for the Missouri, Kansas & Texas Railroad Co. against the United States to recover the value of certain lands granted to the State of Kansas for the use and benefit of certain railroads. We quote as follows from that opinion :

“In our opinion it appears upon the face of the bill that the State of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provided that patents should be issued not to the State but to the company direct, which made the State nothing but a mere conduit for the passage of title

“In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained. . . .

“If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely

nominal party on the record but by the question of the effect of the judgment or decree which can be entered." See also *Oregon v. Hitchcock*, 202 U. S. 69, and *Minnesota v. Hitchcock*, 185 U. S. 373.

But it is insisted that upon the authority of *In Re Debs*, 158 U. S. 564, the *United States v. San Jacinto Tin Company*, 125 U. S. 273, and *United States v. Bell Telephone Company*, 128 U. S. 315, that the United States has authority under the constitution to bring and maintain these suits.

In *In Re Debs*, there was involved the validity of an injunction issued by a Circuit Court of the United States at the instance of the United States to restrain an interference with interstate commerce and with the mails of the United States. It involved the discharge by the United States of a governmental duty and not the participation in a private controversy between two citizens. The suit was brought and the injunction maintained in the exercise of a governmental function. The case is clearly distinguishable from the position taken by the government in these suits.

The case of *United States v. San Jacinto Tin Company* involves the right of the United States to cancel and annul a patent for land granted by the United States on the ground that such patent was obtained by fraud or mistake. With reference to this suit it is stated in *In Re Debs*, 158 U. S. 564, as follows:

"In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285, was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, *though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying*: 'If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United

States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

"It was therefore declared in the *San Jacinto Tin Co.* case, and reaffirmed in the *Debs* case, that the United States had a right to maintain a suit to cancel a patent procured by fraud or mistake, "though it was held that if the controversy was really only between individuals in respect to their claims to property, the government should not be permitted to interfere"

The present suits involve an effort upon the part of the United States to take the part of one of its citizens in a private controversy with another citizen, and not only to maintain the suit by and with the consent of such citizen, but without the consent, and perhaps over the objection of such citizen.

In the case of *The Bell Telephone Company*, 128 U. S. 315, there was involved the right of the United States to maintain the suit to set aside a patent for an invention upon the ground that the patent had been obtained from the United States by fraud or mistake. The jurisdiction was sustained.

The above cases, are in no wise similar to the pending cases, and involve no principle of law here involved.

Section 146. In all the cases cited in support of the right of plaintiffs to maintain such action, there was involved either governmental control of tribal property, or the execution of a trust.

It is insisted by the government, upon the authority of *Beck v. Flourney Live Stock & Real Estate Co.*, 65 Fed. 30; *United States v. Boyd*, 68 Fed. 517; *United States v. Flourney Live Stock & Real Estate Co.*, 69 Fed. 890; *United States v. Flourney Live Stock & Real Estate Co.*, 71 Fed. 576; *United States v. Mullin*, 71 Fed. 682; *In the Matter of Heff*, 197 U. S. 488; and *United States v. Rickert*, 188 U. S. 432, that the United States have such an interest in the subject-matter of the litigation as will entitle them to maintain these actions as the sole plaintiffs. It therefore becomes very material to ascertain what the interest of the United States was in the property involved in each of the cases cited that caused the various courts to sustain the right of the United States to maintain the actions.

The case of *Beck v. Flourney Live Stock & Real Estate Co.*, 65 Fed. 30, can hardly be regarded as an authority for the contention that the United States have such an interest as would entitle them to maintain these actions as the sole plaintiffs. The Flourney Live Stock & Real Estate Company had leased, in violation of law 34,168 acres of allotted Winnebago lands and 1880 acres of unallotted lands lying within the Winnebago Reservation. The Winnebagos occupied a certain tract of land in Nebraska under and by virtue of the Treaty of March 8, 1865 (14 St. 671). The allotments were made, or at least practically all of them, under the Act of February 8, 1887, known as the General Allotment Act (24 Stat. 388). Section Five of that Act provided:

“That upon the approval of the allotments provided for in this act, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States *does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided, that the President of the United States, may, in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.*”

The leases to the Real Estate Company (by which term the Flourney Live Stock & Real Estate Company will hereafter be designated) were contracts touching the allotted lands, were made before the expiration of the twenty-five year period, and were therefore absolutely void. The Indian Agent undertook to remove the representatives of the Real Estate Company from the leased land. The Real Estate Company obtained an injunction. The Circuit Court of Appeals for the Eighth Circuit, in dissolving the injunction, and ordering the bill dismissed, placed its decision upon the ground that the Real Estate Company could not come into a court of equity to enforce a void contract, nor

protect its possession by contracts that were absolutely void. It is difficult to see how this decision could have been otherwise. No suggestion is found in this case that would in any way tend to support the contention of the plaintiff in the cases at bar.

United States et al. v. Boyd et al. involved the right of the United States, with a number of Cherokee Indians as joint plaintiffs, to institute suits against certain defendants to test the validity of a certain contract entered into by certain members of the tribe purporting to represent the tribe, by which the lands of the tribe had been leased. It was specifically held that these Indians had never become citizens of the United States, and that the United States, as guardian, might bring a suit for the protection of their public or tribal property—something that the government is not undertaking to do in this case. Both the judges filing an opinion in that case, to-wit: Simonton and Dick, argued very strongly the proposition that these Indians had never become citizens of the United States, and that if Congress had intended to be relieved of its guardianship it would have made them citizens. Applying the reasons urged in the Boyd case to the cases at bar would result in their dismissal.

United States v. Flourney Live Stock & Real Estate Co., 69 Fed. 886, was a suit instituted by the United States to restrain the Flourney Live Stock & Real Estate Co. (hereinafter called the real estate company) and others from leasing and occupying certain Winnebago lands. A part of these lands were allotted under an Act approved February 21, 1863, which provided that said "lands, when allotted, shall be vested in said Indian and his heirs without the right of alienation, and shall be evidenced by patent" said lands "shall also be subject to such rules and regulations as the Secretary of the Interior may prescribe; but they shall be deemed incapable of making any valid civil contract with any person other than a native member of their tribe without the consent of the President of the United States."

The remainder of the allotted lands were allotted under the General Allotment Act of 1887, above mentioned, which recited that "the United States . . . hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said 5th section) for the period of twenty-five years, in trust for the sole use and benefit of the allottee named therein."

It was further provided that the United States should deliver said land to the allottee, or his heirs, at the expiration of twenty-five years, free from any incumbrance whatsoever. This suit was brought to test the right of the real estate company to take leases of this land. It was held that the United States could maintain the action. The United States, both by its statute and the patent, had bound itself to maintain these Indians in the possession of the allotted lands for a period of twenty-five years, and to execute to each allottee at that time a fee simple patent and deliver the possession of the land unincumbered. The United States was the owner of the title to the land. It had bound itself to maintain the Indian in the possession thereof and to deliver same free and unincumbered at the expiration of the trust period—a condition in no way similar to the conditions in the cases at bar. The case of *Pilgrim et al. v. Beck et al.*, 69 Fed. 895, involves the same question. Nothing, therefore, that is stated in any of the Flournoy cases with reference to the right of the United States to maintain the action can have the least application to the cases at bar.

The case of *United States v. Flournoy Live Stock & Real Estate Company*, 71 Fed. 576, contains a repetition of the conclusions reached in the previous Flournoy cases. It is true in each of these cases it was held that conferring of citizenship on a member of the Winnebago tribe of Indians did not remove existing restrictions upon his right to alienate his land. No contention of that character is involved in this litigation.

The case of *United States v. Mullin*, 71 Fed. 682, was a petition for a writ of habeas corpus under an indictment for assault upon an Indian policeman seeking to enforce the same character of orders involved in the Flournoy cases. It has no application to the questions involved in the cases at bar.

The case of *United States v. Kagama*, 118 U. S. 384, involved the jurisdiction of the court, arising on a demurrer to an indictment against two Indians charged with murder on an Indian reservation in the State of California. There is a general discussion of the relation of the government to the Indian Tribes, but there was nothing before the court that could make what was there said applicable to the conditions existing in this case. The Indian treaties, rights, laws, regulations, etc., in the Kagama case were so entirely different from those in the cases at bar that it is only in the most general way that the Kagama case could be

said to have any application at all to the questions under consideration.

The case of the *United States v. Rickert*, 188 U. S. 432, was a suit instituted in the name of the United States to restrain the collection of State taxes upon the improvements located upon lands allotted under the General Allotment Act of 1887; and certain personal property furnished by the United States and used in the cultivation of the lands of the allottees. This case turned principally upon the right acquired by the allottee under the General Allotment Act and the obligations assumed by the United States. Construing the provisions of the statute, that is section 5 of the General Allotment Act, Mr. Justice Harlan, speaking for the Supreme Court uses the following language:

"The word 'patents,' where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports nothing more than instruments or memoranda in writing designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee or in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper in writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine."

The United States under this statute was the real owner for the purposes of the trust it had assumed, and was unquestionably a proper and necessary plaintiff in a proceeding to protect this property.

With reference to the personal property the following language was used:

"It was, in fact, the property of the United States and was put into the hands of the Indians to be used in execution of the purposes of the government in reference to them." The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

The relation of the United States to the lands and property of the Sioux Indians is so entirely different from the relation of the United States to the persons and property of the Choctaw and Chickasaw allottees, that this case can not be said to be an authority justifying the institution of these suits.

In the case of the *United States v. Paine Lumber Company*, 206 U. S. 467, suit was instituted by the United States to recover of the Paine Lumber Company the value of some seventy-five thousand feet of timber alleged to have been cut and removed from certain lands allotted to members of the Stockbridge and Munsie Tribes of Indians. The Circuit Court of the United States rendered judgment in favor of the defendant.

Discussing the case of *Johnson v. McIntosh*, 8 Wheat. 574, Mr. Justice McKenna, speaking for the court, uses the following language:

"Necessarily the timber when cut 'became the property of the United States absolutely discharged of any rights of the Indians therein.' It was hence concluded 'the cutting was waste and in accordance with well settled principles the owner of the fee may seize the timber cut, arrest it by replevin or proceed in trover for its conversion.' If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, define it exactly. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Libbey v. Clark*, 113 U. S. 250. The title is held by the United States, it is true, but it is held 'in trust for individuals and their heirs to whom the same were allotted.' The considerations, therefore, which determined the decision in the *United States v. Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States."

The judgment of the Circuit Court was thereupon affirmed.

Attention is also called to the well considered opinion of Judge Seaman, Circuit Judge, before whom this case was tried, reported in 154 Federal at page 263.

The case of the *United States v. Saunders*, 96 Fed. 268, was one in which the United States instituted suit to annul a deed given by a member of the Coeur d'Alene tribe of Indians. After holding that the trust provisions inserted in the patent to Quinnemose, the Indian whose conveyance it was sought to cancel, were inserted without authority or law and void.

Judge Hanford continues as follows:

"The bill of complaint is styled a 'bill to quiet title to lands,' but it would be contrary to all rules of equity practice to render a decree in this case for that form of relief, for the simple reason that the bill shows affirmatively that the defendants are in possession of the land. No reason is assigned for demanding equitable relief except that the deed given by Quinnemose to Mr. Saunders, and the claims to the land now being asserted by the defendants, constitute a cloud upon the title of the United States. The case must have been commenced upon the theory that by obtaining a deed from an Indian, Mr Saunders acquired all his grantor's rights, and that said rights have been forfeited to the government by reason of the unlawfulness of the transaction, or else upon the theory that no confiscation of property is asked for, because the deed is absolutely void, and no property is conveyed thereby. Take either horn of the dilemma, and the result is the same, for there is no ground for an appeal to a court of equity. In the first place, the forfeiture of an estate is a penalty, which must be prescribed by law, or it will not be adjudged; and my attention has not been directed to any statute declaring a forfeiture for such causes as are in this bill set forth. In the second place, if the deed is void, it cannot cloud the title of the owner, nor justify the expense and bother of a suit."

In Re Celestine, 114 Fed. 551, was a proceeding in habeas corpus by Mrs. Josie Celestine, an Indian woman, to recover the possession of her child. It was held that the District Court of the United States being one of special and limited jurisdiction and there being no statute conferring jurisdiction over such proceeding upon the District Court, that it was without jurisdiction.

In the course of the opinion, Judge Hanford uses the following language:

"I say that it is not necessary, because the evidence shows that the mother of the child is now married to an Indian to whom an allotment of land has been made pursuant to a law of the United States, and, being a Tulalip Indian, I have a right to infer that he was born in the

United States. Such an Indian is a citizen of the United States, and entitled to all the rights, privileges, and immunities of other citizens, including the right to sue in the proper forum. Congress has relieved the government of all responsibility in such cases as this by conferring the rights of citizenship upon Indians to whom allotments of land have been made. 1 Supp. Rev. St. (2nd Ed.), p. 536; *U. S. v. Kopp* (D. C.), 110 Fed. 160. Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the Constitution, of whom the Supreme Court, in an opinion written by Mr. Justice Bradley, has said:

“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that State there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected.” *Civil Rights Cases*, 109 U. S. 25, 3 Supp. Ct. 31, 27 L. Ed. 844.”

The identical question of jurisdiction and capacity to sue involved in these cases was decided by Judge Sanborn in *United States v. Auger et al.*, 153 Fed. 671. In that case the land had been allotted as in the cases at bar, subject to certain restrictions upon alienation. In violation of these restrictions, defendants had purchased, cut and removed timber from the Indian allotment. The United States brought suit to recover the value of the timber. In the Augur case, the United States based its right to maintain the suit upon the undisputed fact that the allottees held the lands subject to certain valid restrictions upon alienation and that such restrictions extended to the cutting of timber upon the land; that because of such restrictions the United States had such an interest in the timber growing upon such lands as would entitle them to maintain a suit for the value thereof. We quote as follows from Judge Sanborn’s opinion:

“General demurrer to the bill was filed by the defendants, setting up want of equity and want of title in the complainants. Under the patents mentioned the full title to the lands passed to the Indian allottees. The United States has retained no interest whatever. As said by Mr. Justice Brown, in *Schrimscher v. Stockton*, 183 U. S. 290, 299, 22 Sup. Ct. 107, 111, 46 L. Ed. 203:

“The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent (against alienation without the consent of the Secretary of the Interior) would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him notwithstanding any alienation that he might make.’”

It appears from the bill that the timber was sold by the Indians without the consent of the President. Undoubtedly it is true that no title to the timber passed to the defendants, and that the Indians themselves by actions at law in their own names might recover in replevin suits or its value in trespass or trover; but it is difficult to see how the government has retained any interest. . . . The Indian has simply undertaken to sell the timber without any right so to do, and the purchaser has taken it off and sold it to other persons. The sole right of action is in the Indian allottees. There seems to be nothing upon which a trust relation can be founded. The late case of *United States v. Paine Lumber Co.*, 27 Sup. Ct. 697, 51 L. Ed. , seems to be decisive of the question here involved.

“It is no doubt true that the Indian allottees will not bring suits, and that in the practical sense there is no remedy in such a case as this. If it were possible to find any remedy, it ought to be applied, and some means found to protect the Indians in their improvidence; but Congress has not seen fit to give any remedy, and the demurrer should therefore be sustained.”

This decision is by one of the presiding Circuit judges of this circuit, and is convincing in logic and persuasive as an authority. It is difficult to see upon what theory the jurisdiction of the court to entertain these suits or the capacity of the United States to begin the suits can be sustained.

Section 147. Plaintiffs have no such interest in the subject-matter as will authorize the maintenance of such actions.

By the provision of the Act of Congress, May 28, 1830 (4th Stat. 411), and the treaty between the United States and the Choctaws and the Chickasaws, dated June 25, 1855 (11 Stat. 611) the government granted to the Choctaws and Chickasaws, their heirs and successors, to be held in common, the land constituting what was subsequently known as the Choctaw and Chickasaw Nations. The patent thereto in due form was issued by the President of the United States; the Choctaws and Chicka-

saws continued their tribal existence and continued to reside upon these lands as the common property of the tribes, until subsequent to the 28th day of June, 1898. On that date the President approved the act providing for the allotment of the lands of the two tribes among the members thereof. (30 Stat. 495.) It was found that this agreement failed to provide for a number of matters of importance concerning the allotment of the lands, and the winding up of the affairs of the two tribes, and another agreement was entered into which became effective September 25, 1902. (32 Stat. 641.) The last-mentioned agreement is commonly known as the Supplemental Agreement. It provides machinery for the completion of the tribal rolls, the allotment of the tribal lands, the distribution of tribal funds, and the transmission of the title to the lands selected in allotment to the allottee. Incidentally, it makes provision for the disposition of townsites, of coal and asphalt, the claims of the Chickasaw freedmen and Mississippi Choctaws, and otherwise provides for the complete disposition of all tribal affairs.

The matter of the allotment of lands is dealt with in sections eleven to twenty-four of this agreement. In this agreement the United States are to provide machinery for the allotment of the lands in severalty. Other than providing the machinery for the making of the tribal rolls and the allotment of the lands, the government of the United States assumes but one obligation in reference to the protection of the allottee, and that is found in section 23 and is as follows:

“Allotment certificates issued by the Commission to the Five Civilized tribes shall be conclusive evidence of the right of any allottee to the tract of land therein; and the United States Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian Agent hereunder, shall not be controlled by the writ or process of any court.”

Section 68 of this Supplemental Agreement is as follows:

“No act of Congress or treaty provision, nor any provision of the Atoka agreement inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations.”

Section 23, *supra*, provides by agreement between the United States and the tribes the one remedy which the government of the United States is to furnish the allottee to acquire possession of his land. That remedy is through the United States Indian agent at the Union Agency, and it is especially provided that no court shall interfere with his action in placing an allottee in possession of his allotment. The allottee having once been placed in possession of his allotment, the obligation of the government is absolutely discharged. It is under no obligation of any character to the allottee to maintain him in the possession of his allotment.

Congress has dealt with the Five Civilized Tribes by separate and independent legislation. But little, if any, general legislation applicable to tribal Indians has ever been applicable to the Choctaws and Chickasaws. No doubt, in order to prevent embarrassment by attempting to apply the laws applicable to other tribal Indians to the Choctaws and Chickasaws, Section 68, *supra*, was inserted in the Supplemental Agreement. There is no allegation of any character in the bill that the allottees have not been placed in possession of their allotments in accordance with Section 23 of the Supplemental Agreement. If not the remedy is through the Indian Agent.

No doubt the realization of the fact that no authority could be found in the Supplemental Agreement, placed counsel for plaintiffs in the embarrassing position of having to go back and rely upon the treaties of 1830 and 1855, whereby the government guaranteed the lands embraced within certain limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors *to be held in common*. If that treaty is to be relied upon, then the court must declare null all subsequent agreements, and adjudge that the lands shall be held in common. It was held by the Circuit Court of Appeals for the Eighth Circuit in the case of *Wallace v. Adams*, 143 Federal 721, that the allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it issued is entitled to the land, and it is a conveyance of the right to this title to the allottee. A member of the tribe selects his allotment, receives his certificate and so far as the bill discloses in this case, takes possession of his land, and thereafter, either he or his heirs convey, encumber or lease the same. The govern-

ment has fully discharged every obligation assumed by it in the Supplemental Agreement. The lands have passed to the allottee by an indefeasible title and the government no longer has any interest whatever in the same. It has consented to the division of the lands and the conveyance of the same to the allottee, which conveyance vests in the allottee an absolute and indefeasible title.

By an agreement between the United States and the tribes, certain restrictions are imposed upon the right of the allottee to alienate. Whether or not any of the conveyances assailed are made in violation of the various laws imposing or extending restrictions, can be determined only by an investigation of the individual transaction. The government has never at any time or at any place agreed to hold the land of the allottee of either the Choctaw or Chickasaw tribes in trust or to deliver the land selected in allotment to such allottee free from encumbrances at any given time. The government occupies no trust relation whatever with reference to the lands allotted to the Choctaws and Chickasaws, nor has it assumed any obligation by agreement or otherwise to inter-meddle with the individual transactions of the allottees.

Neither cases holding that the United States have authority to punish crimes and offenses, committed within the tribal domain of Indian tribes, nor those sustaining the authority of the Government of the United States to enforce and carry out the trust provision contained in the trust patents, issued to the allottees under the General Allotment Act, in any wise tend to support the authority of the United States to institute and maintain these actions. Decisions relating to the authority of the government to control the tribal property are likewise just as inapplicable.

Prior to the making of the Supplemental Agreement, to-wit on the 3rd day of March, 1893, Congress enacted a law, Section 15 of which reads as follows (27 Stat. 645) :

“The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the

sum of twenty-five thousand dollars or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.'

It will be observed that it is provided in this section that "upon such allotments the individuals to whom the same may be allotted shall be deemed to be in *all* respects citizens of the United States." The word "all" is evidently inserted here for some purpose. It is not that such allottee shall be deemed in some respects a citizen of the United States, or shall have in some respects the rights of the citizens of the United States, but it is that they shall be deemed to be in ALL respects citizens of the United States.

Then there is the concluding clause of the section: "and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Therefore, under the provision of the very law creating the Commission, it was provided that every Indian who had received his allotment should be deemed in all respects a citizen of the United States, and that thereupon the reversionary interest of the United States therein, should be relinquished and should cease. The bill in this case is based upon the assumption that the Indian is a citizen of the United States for some purposes only, and not in the full sense of the word, and that the United States has title lands of the allottee.

On March 3, 1901 (31 Stat. 1447), the President approved an act amending the Act of February 8, 1887, section 6 of which act (24 Stat. 388) provides:

"That every Indian of the Indian Territory is hereby declared to be a citizen of the United States and is entitled to *all* the rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The Attorney-General seems to be of the opinion that the concluding clause, "without in any manner impairing or other-

wise affecting the right of any such Indian to tribal or other property," is of much significance. It would have been a strange construction of this statute indeed, in the absence of this clause to have held that conferring the right of citizenship impaired the right of the person who thereby became a citizen in and to any property rights of whatsoever character. The words "other property" applies to the horse, dog, or wearing apparel, as well as to the allotment or tribal property.

Attention is called to this act because of its great importance in determining the authority of the United States, and for the reason that Congress is deemed to have known of its existence, when its consent was given to the Supplemental Agreement of 1902.

Congress provided that every member of the Choctaw and Chickasaw tribes of Indians who selected his land in allotment should thereupon be deemed in all respects a citizen of the United States and that thereupon the reversionary interest of the United States therein should be relinquished and cease.

Following this an agreement is made for the allotment of the lands, which is found to be imperfect. Pending the negotiation of a new agreement, every Indian in the Indian Territory is made a citizen of the United States, with *all* the rights, privileges and immunities of such. Then a new agreement is entered into for the division of the lands. This agreement is made pursuant to and in execution of the provisions of the Act of March 3, 1893 (27 Stat. 612.) Construing these three provisions together, we find the status at the time of the institution of these suits as follows: The individual Indian has selected his allotment pursuant to the terms of the Supplemental Agreement, and had received his certificate and perhaps his patent therefor. He had become a citizen of the United States in all respects, both under the terms of the Act of March 3, 1893, and of the Act of March 3, 1901. The reversionary interest of the United States, if any, in and to the lands selected in allotment had ceased. Under this condition of affairs, it is respectfully submitted that the United States had no interest whatever in the lands of the allottee, and no control over the person of the allottee, and no right whatever to institute or maintain these suits.

It is next insisted that the citizenship of the allottee does not interfere with the right of the government to maintain these

suits. There is cited in support thereof, certain cases where the United States had assumed a trust relation and guaranteed to the individual members of the tribes to convey the land involved to such members free of encumbrance at the expiration of a given time. The courts held and very properly so, that the making of these Indians citizens of the United States did not remove the restrictions upon alienation, nor discharge the government from the obligations which it assumed by solemn contract with the allottees.

This is the extent to which these cases go, and they furnish no authority for these proceedings.

From the time of the Declaration of Independence every American boy, however humble may have been his home life and surroundings, has been taught that there can be no greater heritage than to be possessed of all of the rights, privileges and immunities of a citizen of the United States. The glories of such a citizenship have been pictured in the most glowing terms by the Statesman, the Patriot and the Poet. If the contention of the United States be true, the Indian is a citizen who cannot proclaim the glories of American citizenship, or the benefits accruing therefrom. To him, it is said, "Citizenship in the United States means nothing; it is a delusion and a snare. You were so told, not because it is true, but in order to induce you to allot your lands in severalty." And it is the United States, not the anarchist, the monarchist, nor the undesirable citizen, that thus decries the benefits of American citizenship.

The Supreme Court of the United States, however, has said that the phrase "rights, privileges and immunities of citizens of the United States" is not meaningless. It has said that when the guardianship is once discharged, that is, when the Indian is made a citizen of the United States, such guardianship cannot be resumed without the consent of the Indian and the State.

The Attorney-General made the same contention in *In the matter of Heff*, 197 U. S. 497, that is made here. His contention as stated by the reporter in the case, is as follows:

"If these Indians are citizens at all, they are not citizens of full competence, just as minors are citizens and subject to rights and duties as such, but are not sui juris in other respects."

In support of this limited citizenship contention, the same authorities were cited as are cited in support of the bill in these cases. And this contention was repudiated by the Supreme Court. It was further contended by the Attorney-General that "The continuance of the relation as wards relates both to property and to personal protection. The personal protection is at least as important, and the time of all others when Indians need this protection is when they are taking their first tentative steps as citizens." The contention that the relation of guardian and ward continue, was directly and unequivocally denied by the court. Substantially every contention argued in support of the bill in this case was urged in support of the jurisdiction of the court that convicted Heff. In no single matter involved in the present controversies was the contention of the government sustained in the Heff case. Speaking of the decision of the Supreme Court in the *Heff case*, Judge Hanford in the case of *Ex parte Viles*, 139 Fed. 70, uses the following language:

"I understand the decision of the Supreme Court in the *Heff case* as a broad declaration of a fundamental principle—that Congress has no power by special legislation to classify citizens, so as to create race or other distinctions, and subject one class or grade of citizens to police regulations not applicable to all citizens, and incompatible with the reserve power of the States to enact and enforce valid local laws, and that when an individual has once acquired the rights and privileges of a citizen and become subject to State laws, his status cannot be changed by act of Congress, without his individual consent and the concurrent assent of the State in which he resides."

The members of the Choctaw and Chickasaw Tribes, for whose supposed benefit the bills under discussion have been filed, are citizens of the United States. They own the absolute fee to the lands allotted to them. The United States has parted with its reversionary interest. If the bills in these cases are to be maintained, it must be that because the party on whose behalf they are brought has "Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or individual himself consents." Yet this is the contention that was so eloquently condemned by Justice Brewer in *In the matter of Heff* (197 U. S. 508).

Every single Indian on whose behalf these bills have been filed may institute a suit in his own name, or if he be a minor, in the name of his guardian, or next friend, to recover the possession of the property sued for. If the contention of the plaintiffs in these actions, that the conveyances are void, is true, suit could be instituted by the allottee in a court of competent jurisdiction to have such conveyance so adjudged. The right to do so is one of the rights, privileges and immunities of citizenship in the United States, which the United States has twice guaranteed him as an inducement to accept an allotment of tribal lands. It is one of the common ordinary rights of citizenship that belongs to that class described by the Attorney-General as not being even *sui juris*, to-wit, minors, incompetents and insane. The plaintiffs after having twice granted these rights to the Indians on whose behalf these suits are brought, have in violation of their promise, twice repeated and declared, assumed to exercise the same right which they guaranteed to each and every Indian residing in Indian Territory, and to each and every member of the Five Civilized Tribes who should consent to allotment and select in accordance therewith his pro rata share of the allotable lands of the Tribe.

These suits are brought, not in the keeping of any agreement or obligation, but in direct violation of a public law imposing the obligation upon the United States to guarantee unto each of these Indians unreservedly the right which is now being asserted as against such guarantee.

We presume no one will question the right of any of the parties on whose behalf these suits are brought, to institute suits if they desire to do so. Suppose the United States should not be able to sustain these bills, would the judgment rendered in these cases be *res adjudicata*, either in favor of the defendants in these actions or against the citizens of the United States on whose behalf they volunteered to bring the same? It seems to us there is but one answer to this question; and that is,—they would not. Why should a bill be maintained when a judgment in favor of one of the parties, at least, would amount to nothing. It seems to us that no better reason could be urged against the want of capacity of the United States to bring these suits, than that a judgment against the United States would not be *res adjudicata* in a suit instituted by the grantor.

The foregoing is substantially a literal quotation from the brief filed on behalf of certain of the defendants. Certain other contentions were made, which will simply be stated and authorities cited in support thereof referred to for brevity. Each of the defendants insisted that the Bill of Complaint was multifarious, and cited in support of such contention the following cases: *Hale v. Allison*, 188 U. S. 56. 1 Pomeroy's Eq. (3d. Ed.), Secs. 251½, 251¾; *Best v. Drake*, 11 How. 371; *Tribbet v. Railroad*, 19 L. R. A. 66; *Turner v. Mobile*, 33 So. 132; *Van Auken v. Dammierer*, 40 Pac. 89; *Tompkins v. Craig*, 93 Fed. 885; *West v. Philadelphia*, 49 At. 891; *Leidig v. Bucher*, 74 Penn. 67; *St. L., B. & S. Co. v. Hopkins*, 100 Ill. App. 567; *Newell v. Nicholson*, 43 Pac. 180.

In support of the contention that plaintiffs being out of possession could not maintain the bill the following cases were cited: *Frost v. Spitly*, 121 U. S. 556; *Orton v. Smith*, 18 How. 265; *Deck v. Foraker*, 155 U. S. 841; *United States v. Wilson*, 118 U. S. 84; Sec. 478, Wilson Statutes; *Christy v. Spring*, 11 Okla. 710, 69 Pac. 864; *Eaton v. Gile*, 3 Kan. 24; *Douglas v. Nuzen*, 16 Kan. 515; *Douglas v. Bishop*, 24 Kan. 749.

That a bill in equity will not lie to cancel a void conveyance the following authorities were cited: *Piersoll v. Elliott*, 6 Pet. 101; *Rich v. Braxton*, 158 U. S. 407; *Kennedy v. Hazelton*, 128 U. S. 672; *Venice v. Woodruff*, 62 N. Y. 467.

Other contentions of a minor nature were made, and were each followed by general discussion of the subject when the lands of the allottees to the various members of the Five Civilized Tribes became alienable.

Since the above has been in print Judge Campbell has rendered his decision, holding that the Indians of the Five Civilized Tribes are citizens of the United States and of the State of Oklahoma; that guardianship over their persons has ceased; that the United States have no such interest in the lands as will entitle them to maintain the action and that the bills are multifarious. A judgment of dismissal has been entered. An appeal will be prosecuted by the plaintiffs to the circuit court of appeals in a number of test cases.

TRIBAL TITLE; CITIZENSHIP; ALLOTMENT; RESTRICTIONS UPON ALIENATION, REMOVAL THEREOF; DESCENT, ETC., AS APPLICABLE TO ALL ALLOTTEES IN THE STATE OF OKLAHOMA OTHER THAN THOSE OF THE FIVE CIVILIZED TRIBES.

CHAPTER XXXI.

TRIBAL TITLE, CITIZENSHIP AND ALLOTMENT.

Section 148. Tribal title.

Each of the several Indian Tribes occupying reservations in the State of Oklahoma, other than the Five Civilized Tribes, acquired the right to hold the same by virtue of treaty, agreement, act of Congress or executive order. With but few exceptions there is slight difference in the character of title by which such tribes have held the various reservations; one of the few exceptions is that of the Osages, which tribe acquired and held title in the nature of a qualified fee. The tribal right of occupancy, however, was usually purchased and paid for by the tribes at prices substantially the equivalent of that which the Osages and each of the Five Civilized Tribes paid for the fee.

It is not considered necessary to discuss in detail the treaties, agreements, acts of Congress and executive orders by which the various tribes acquired their rights in and to the lands which they occupied. The right acquired by treaty or agreement, accompanied by grant, represents the highest character of title acquired or held by tribal Indians to tribal reservations. The

next in rank is that acquired by act of Congress, which usually assumed the form of a legislative grant. Not infrequently the legislative grant is but the execution of the terms of a treaty or agreement made with an Indian tribe.

The reservation by executive order hardly rises to the dignity of a title. It is a mere designation of a tract of land by the executive department of the Government for the use and occupation of a given tribe of Indians. The reservation by executive order was sometimes, however, made pursuant to an agreement between the tribes and United States, which agreement did not contemplate, receive or require the sanction of congressional approval. Such agreements were made by the President or by the Department of the Interior, under the general authority, conferred by Congress upon the executive department, of supervision over tribal Indians and tribal property. While the Government of the United States in the exercise of its guardianship over the tribal Indians and tribal property, has used this authority to require, and sometimes to compel, a partition of the tribal property among the individual Indians, it has seldom, if ever, undertaken to do so where the tribal title is by grant, without having the assent of the tribe in some form to such partition or allotment in severality.

Section 149. Tribal citizenship.

Citizenship or membership in an Indian tribe, other than the Five Civilized Tribes, has, until recently, been determined exclusively by the Secretary of the Interior. His jurisdiction was exclusive and the right of a person claiming to be a member of an Indian tribe, whose right of membership in the tribe (sometimes termed citizenship) had been denied for any reason, or who had been denied the privilege of taking an allotment by the Secretary of the Interior, was without remedy. On the 6th day of February, 1901, the President approved an Act (31 Stat. 760), authorizing the institution by all persons of Indian descent, other than members of the Five Civilized Tribes, or Indians located in the Quapaw Agency, of suits to determine their right to select, acquire and hold allotments. Under the provisions of this Act, a member by blood of any Indian tribe, other than members of those tribes excluded by the Act, might institute a suit to have his right to select and hold an allotment,

determined; and this, notwithstanding that the denial of his right to take and hold an allotment was based upon a denial of his citizenship or membership in the tribe.

It is the apparent purpose of this Act to provide for a judicial review of the action of the departmental officials in such cases, regardless of the reason assigned by such officials for their refusal to recognize the right of the applicant to take and hold an allotment.

Section 150. Allotment.

Allotment, or partition of tribal lands to members of Indian tribes has uniformly been made by the Secretary of the Interior or under his direction and supervision. This is not only true with reference to the General Allotment Act, but the special allotment agreements with the various Indian tribes, contained provisions similar to those in the General Allotment Act. Under all of the allotment agreements the preference right to select a particular tract or parcel of land in allotment is awarded to the owner of the improvements upon such tract, or in the absence of improvements, to the member in the rightful possession thereof. Exclusive jurisdiction is, however, vested in the Secretary of the Interior to determine who, under any given state of facts, is entitled to exercise this preference right.

The provisions in the various agreements for selecting, perfecting and passing title to the lands selected in allotment differ somewhat, but the differences are not such as to render their consideration necessary in this connection.

The title of an allottee is perfected by the issuance of a patent. Under the General Allotment Act, as well as under a few of the special allotment agreements, there is both a preliminary and a final patent. This preliminary patent is usually called a trust patent; under its terms the United States declares that it will hold the land described for a given period for the sole use and benefit of the allottee and his heirs and at the expiration of such period will convey the same to the allottee or his heirs, by fee simple patent, free of encumbrances of any character whatsoever. Sometimes only one patent is issued, which is in the form of an ordinary grant but contains a repetition of the provisions of the Act under which the lands are allotted and which impose restrictions upon alienation. Such patent

usually recites or makes reference to such provisions imposing restrictions upon the right of allottee to alienate the land granted, principally for the purpose of giving notice to would-be purchasers of the extent of the limitation upon the allottee's right to convey the lands granted.

Where the fee simple title is vested in the tribe the patent is prepared under the supervision of the Department of the Interior, but executed by the principal chief of the tribe. Where the fee is in the United States and the mere right of occupancy in the tribe, the patent is executed by the United States.

Section 151. Acts under which allotments were made.

The lands of tribal Indians of other than the Five Civilized Tribes in Oklahoma, were allotted under the following acts and agreements:

Absentee Shawnees: Act of March 3, 1891, 26 Stat. 989; 1 Kapp. 410.

Cheyenne and Arapahoes: Act of March 3, 1891, 26 Stat. 989; 1 Kapp. 415.

Citizen Pottawatomie: Act of March 3, 1891, 26 Stat. 989; 1 Kapp. 409.

Confederated Weas, Peorias and Western Miamias: Act of March 2, 1889, 25 Stat. 1013; 1 Kapp. 344.

Eastern Shawnees: General Allotment Act of 1887, and amendment thereto of 1891; Act of May 27, 1902, 32 Stat., 245, 1 Kapp. 752.

Iowas: Act of February 13, 1891, 21 Stat. 749; 1 Kapp. p. 389.

Kansas or Kaws: Act of July 1, 1902, 32 Stat. 636; 1 Kapp. 766.

Kickapoos: Act of March 3, 1893, 27 Stat. 557; 1 Kapp. 480.

Kiowas, Comanche and Apachaes: Act of June 6, 1900, 31 Stat. 672; 1 Kapp. 709.

Modocs: General Allotment Act, Feb. 18, 1887, 24 Stat. 388; 1 Kapp. 33. Amendment thereto of February 28, 1891, 26 Stat. 794, 1 Kapp. 56.

Osages: Act of June 28, 1906, 34 Stat. (Part 1) 539.

Otoe and Missouriia: Act of February 8, 1887, 24 Stat. 388; 1 Kapp. 33; amendment thereto of February 28, 1891, 26 Stat. 794; 1 Kapp. 56. Act of May 30, 1894, 28 Stat. 84; 1 Kapp. 510.

Ottowas: Act of February 8, 1887, 24 Stat. 388; 1 Kapp. 33;

Act of February 28, 1891, 26 Stat. 794; 1 Kapp. 56.

Pawnees: Act of March 3, 1893, 27 Stat. 612; 1 Kapp. 496.

Poncas: Act of February 8, 1887, 24 Stat. 388; 1 Kapp. 33.

Pottawatomies: (See Citizen Pottawatomies.)

Quapaws: Act of March 2, 1895, 28 Stat. 876; 1 Kapp. 566.

Sac and Fox: Act of February 13, 1891, 26 Stat. 749; 1 Kapp. 389.

Senecas: Act of February 8, 1887, 24 Stat. 388; 1 Kapp. 33;

Act of February 28, 1891, 26 Stat. 794, 1 Kapp. 56;
32 Stat. 262.

Tonkawas: Act of March 3, 1893, 27 Stat. 612; 1 Kapp. 494.

Wichitas and Affiliated Band: Act of March 2, 1895; 28 Stat. 895; 1 Kapp. 560.

Wyandottes: Act of February 18, 1887; 24 Stat. 388; 1 Kapp.

33. Act of August 15, 1894, 28 Stat. 301; 1 Kapp. 522.

The act of June 19, 1902 (32 Stat. 744; 1 Kapp. 800) contained the following provision:

“Insofar as not otherwise specially provided, all allotments in severalty to Indians outside of the Indian Territory, shall be made in conformity to the provisions of the Act, approved February 8, 1887, entitled ‘An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes;’ and other general acts amendatory thereof and supplemental thereto, and shall be subject to all the restrictions and carry all of the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.”

This provision makes the solution of many questions affecting the allotted lands of members of the various tribes much less difficult. It is often difficult to determine what particular rule to apply to a given tribe in the absence of an agreement covering the disposition of a given matter. This furnishes as a standard the General Allotment Act and the amendments thereto.

Section 152. Allotments; suits affecting right to.

The provision of the Act of February 6, 1901, Sec. 863, conferring upon the circuit courts of the United States jurisdiction to entertain suits instituted by “any person of Indian blood

or descent," claiming to be entitled to an allotment has been considered and construed by the Supreme Court of the United States so as to give it the very broadest possible effect. This statute was first presented for judicial consideration in the case of *Hy-yu-tse-mil-kin v. Smith*, 119 Fed. 115. In the opinion of the Circuit Court of Appeals for the Ninth Circuit, construing this statute, the following language is used, "This language is certainly broad enough to confer upon the Circuit Courts jurisdiction to hear and determine the complaint of any person, who is in whole or in part of Indian blood, and who claims to have been unlawfully denied or excluded from any allotment or parcel of land, to which such person claims to be lawfully entitled by virtue of any Act of Congress, and such is the nature of the Bill filed by the claimants in this case."

This decision of the Circuit Court of Appeals was affirmed by the Supreme Court of the United States (194 U. S. 401). The State courts have no jurisdiction to entertain suits in this class of cases, the jurisdiction of the courts of the United States being exclusive, and such courts may determine the right to citizenship where the denial of the right to take an allotment is based upon a denial of the right of citizenship or membership in the tribe as though the denial was for other reasons. (*McKay v. Kalyton*, 204 U. S. 458; *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 413.)

There was also contained in the Indian Appropriation Bill, approved March 3, 1893 (27 Stat. 631), the following provision.

"In all States and Territories where there are reservations or allotted Indians, the United States District Attorney shall represent them in all suits at law and in equity."

This provision clearly contemplates that the United States Attorney shall act as counsel for any Indian allottee without compensation. It certainly does not confer authority upon the United States Attorney to bring a suit in the name of the allottee without his knowledge or consent to recover the possession of his allotment or to assail a conveyance made thereof. If it were not for the fact that all allottees were made citizens of the United States upon the selection of an allotment and the issuance of a preliminary patent, it would be doubtful if it were contemplated that this section should extend to those Indians who had become citizens of the United States with all the rights, privileges and immunities of such.

CHAPTER XXXII.

GENERAL ALLOTMENT ACT.

Section 153. Title of allottee to allotment selected and held under general allotment act.

The General Allotment Act of 1887 is reproduced in full as Chapter 23 in Part 2 hereof and is found in Sections 837 to 852. The material provisions of this Act are Sections 5 and 6 and are found in Sections 839 to 847. For convenience in discussing the various subjects, the original provisions of this Act have been further subdivided into sections. The section number references, where not otherwise identified, refer to the section numbers in Part 2.

Section 5 of the said General Allotment Act contains the following provision:

“That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; *Provided*, That the President of the United States may in any case in his discretion extend the period.”

What is the nature of the title with which an allottee, who has selected an allotment under this provision and to whom a trust patent has issued, is vested? Does said provision (Section 839) considered without reference to the other provisions of Section 5 of said General Allotment Act, impose restrictions upon alienation? The legal effect of the patent as declared in Section 839, is that the “United States does and will hold the lands thus allotted for the period of twenty-five years in trust for the

sole use and benefit of the Indian, to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." Does the reservation for the exclusive use and benefit of an Indian allottee, or his heir, impair or restrict the right of alienation? Is this provision within itself, and without reference to the other provisions of the Act, a restriction upon alienation? Does the guarantee of the Government that it will at the expiration of the trust period convey the fee, discharged of the trust and free of all charges and incumbrances, constitute a warranty against conveyances or encumbrances created by the voluntary act of the allottee? If Congress deemed the reservation of title and the guarantee of the conveyance of the allotted land at the expiration of the trust period, free of all charge and encumbrance, a restriction upon alienation for that period, it would have hardly found it necessary to follow such provision with a positive restriction against alienation or incumbrance.

It has been sometimes contended that where the title is in the United States, that the owner of the trust interest, beneficial estate, or equitable title, may not convey, and that a reservation of the title in the United States is within itself a restriction upon alienation. It is believed that it may be stated as a general rule of law, that every estate or interest in land, accompanied by a present possession thereof, regardless of how limited the estate may be, is capable of being alienated in the absence of the imposition of restrictions upon alienation.

This right of alienation is exercised every day in the ordinary business affairs of life where leasehold and contingent interests in real estate are conveyed, transferred or assigned.

The United States have uniformly recognized the validity of conveyances of public lands where all the conditions precedent to the acquiring of title have been complied with, notwithstanding they continued to hold the legal title.

The Supreme Court of the United States in the case of *Threadgill, Admr. v. Pintard*, 12 How. 36, held that a mere right of pre-emption in public lands was capable of being

alienated, notwithstanding the title to the lands was in the United States.

In *Myers v. Croft*, 13 Wall. 291, the Supreme Court of the United States considered the effect of the prohibition against alienation before entry by an applicant for pre-emption. Mr. Justice Davis, speaking for that court, uses the following language:

"This section, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

"The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and independently of the legislation of Congress assignable. The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restrictions upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent.

"If it had been the purpose of Congress to attain the object contended for it would have declared the lands themselves unalienable until the patent was granted. Instead of

this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was, in good faith, the owner of the land, and had done nothing inconsistent with the provision of the law on the subject."

In *Lamb v. Davenport*, 18 Wall. 307, the same conclusion is reached as in *Myers v. Croft*, supra. The law as stated in the syllabus of the case is as follows:

"Unless forbidden by some positive law, contracts made by actual settlers upon public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title."

The contention that the legal title being in the United States, is a bar to the right to alienate an equitable estate or possessory interest, seems to be entirely refuted by the above decisions and others of like character of the Supreme Court of the United States. It may also be seriously doubted whether, considering the context, it was contemplated by the term "reserved for the sole and exclusive use and benefit of the allottee and his heirs" to thereby impose an independent restriction upon alienation.

The nature of the preliminary patent issued under the above provisions and the interest it passes to the allottee has been the source of extensive litigation. In the case of *United States v. Rickert*, 188 U. S. 432, the character of the title passing or the right acquired by the allottee is described by Mr. Justice Harlan, speaking for the Supreme Court of the United States, in the following language:

"The word 'patents,' where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents,' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments of memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land

allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.”

This is the extreme limit to which any court has minimized the effect of the preliminary patent issued to allottees under the General Allotment Act. In a subsequent case the same court had under consideration the provision of the Stockbridge and Munsie Agreement for the allotment of lands in severalty to the members of those tribes, where no conveyance or grant of any kind had been executed by the United States. The title and right of an allottee under the provisions of said Agreement were considered by the United States Supreme Court in the case of *U. S. v. Paine Lumber Co.*, 206 U. S. 467, and Mr. Justice McKenna, speaking for the court, uses the following language:

“If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Schly v. Clark*, 118 U. S. 250. The title is held by the United States, it is true, but it is held “in trust for individuals and their heirs to whom the same were allotted.” The considerations, therefore, which determined the decision in *United States v. Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States.”

The principles declared in the case of the *United States v. Rickert*, supra, and of *United States v. Paine Lumber Company*, supra, do not seem to be in entire harmony. The extent to which the rights passing under a trust patent to an allottee are minimized in the case of *United States v. Rickert*, supra, has perhaps been somewhat limited by subsequent expressions of the same court, where questions of substantially the same character have been involved.

It is said by the Supreme Court of Washington in the case of *Frazee et ux. v. Piper*, 98 Pac. 762, speaking with reference to substantially the same provision in a special allotment agreement that the interest of the allottee "in the land, although subject to restrictions on alienation, for a period of twenty-five years from the date of the patent, is such that, by lapse of time, it will ripen into a full and complete fee simple title, and is one under which they are entitled to a present exclusive possession of the land, as against all the world. Such an interest is certainly as high an order of title as that in which *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, we held to be in the nature of a base or qualified fee and is of sufficient value and rank to enable the respondent to prosecute this act for possession."

In the case under discussion it was insisted that the title was in the United States and the allottee could not maintain an action for possession in his own name, but that such action must be maintained, if at all, in the name of the United States. By the provisions of the General Allotment Act, under consideration, the United States is bound to hold the legal title to the land for a period of twenty-five years and at the expiration of that time (unless the time should be extended by the President) to convey to the allottee a fee simple unconditional title, free from any incumbrances and free from all restrictions upon alienation. The title to the land is to be held for the sole and exclusive use and benefit of the allottee and his heirs and not in any wise for the use or benefit of the United States. The United States is a trustee of the legal title without beneficial interest, but assuming certain burdens in connection with the trusteeship. The allottee is placed in possession and has the unqualified and unlimited right of possession, not only after the expiration of the trust period but during the same. (*United States v. Thurston Co.*, 143 Fed. 291; *Godfrey v. Iowa Land & Trust Co.*, 95 Pac

792; *DeGraffenreed v. Iowa Land & Trust Co.*, 95 Pac. 624; *Crews et al. v. Burcham et al.*, 1 Black 357, 17 L. Ed. 91; *Stark v. Starrs*, 6 Wall. 418, 18 L. Ed. 925; *Francis v. Francis*, 203 U. S. 238, 51 L. Ed. 167; *Dewey v. Campaw*, 4 Mich., 566; *Wallace v. Adams*, 143 Fed. 720, 74 C. C. A. 540; *Briggs v. Washpuk-qua*, 37 Fed. 135; *Porter v. Parker*, 94 N. W., 123; *Oliver v. Forbes*, 17 Kans., 127; *Pickering v. Lomax*, 145 U. S. 310, 36 L. Ed. 716; *Lykins v. McGrath*, 184 U. S. 169, 46 L. Ed. 485; *U. S. v. Auger*, 153 Fed. 671; *Bird v. Terry*, 129 Fed. 472; *U. S. v. Dooley*, 151 Fed. 697; *Libby v. Clark*, 118 U. S. 250; *Starr v. Campbell*, 208 U. S. 527; *National Bank of Commerce v. Anderson*, 143 Fed. 87; *Strother v. Lucas*, 12 Pet. (U. S.) 410, 9 L. Ed. 1187; *Stoddard v. Chambers*, 2 How. (U. S.) 284, 11 L. Ed. 269; *Les Bois v. Bramell*, 4 How. (U. S.) 449, 11 L. Ed. 1051; *Landes v. Brant*, 10 How. (U. S.) 348, 13 L. Ed. 449; *United States v. Brooks*, 10 How. (U. S.) 442, 13 L. Ed. 489; *French v. Spencer*, 21 How. (U. S.) 228, 16 L. Ed. 97; *Berthold v. McDonald*, 22 How. (U. S.) 334, 16 L. Ed., 318; *Doe v. Wilson*, 23 How. (U. S.) 458, 16 L. Ed. 584; *Challefoux v. Ducharme*, 4 Wis., 554; *Cornelious v. Kessel*, 128 U. S. 456-463, 9 Sup. Ct. 122; *Bissell v. Penrose*, 8 How. (U. S.) 317, 12 L. Ed. 1095; *Shepley v. Cowan*, 91 U. S. 330-340, 23 L. Ed. 424; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 65-68, 16 Sup. Ct. 939, 41 L. Ed. 72; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Spies v. Newberg*, 71 Wis., 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Morrison v. Faulkner* (Tex. Civ. App.), 21 S. W. 984; *Rozell v. C. M. & L. Co.* (Ark.), 89 S. W. 469; *Frost v. Missionary Society*, 56 Mich. 62, 22 N. W. 203; *Jackson v. Ramsey*, 3 Cow. (N. Y.) 76, 15 Am. Dec. 242, 3 Washburn, Real Property, (6th Ed.) 2034; *Thomas v. Gay*, 169 U. S. 264-266, 18 Sup. Ct. 340, 42 L. Ed. 740; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616, 20 L. Ed. 227.)

Section 154. Alienation, restriction upon.

Section 5 of the General Allotment Act (See Section 840) contains the following provision imposing restrictions upon alienation:

“And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.”

The language of this provision is clear and explicit. It is a restriction upon alienation or encumbrance in the most positive language for the period of time mentioned in the statute, to-wit, twenty-five years. No right can be acquired in or to the lands covered by such trust patent during the trust period, nor will contracts be sustained evasive of the provision of the act and accomplishing indirectly what could not be accomplished by direct conveyance or encumbrance. A contract in violation of the provisions of this act can not be the basis of a cause of action or defense, and no estoppel of any character can arise thereon. It is the purpose of this provision to maintain the lands thus allotted for the use and benefit of the allottee, free of any encumbrance, charge or obligation of any character whatsoever during the trust period. A removal of all restrictions upon alienation at any time before the expiration of the trust period, would effectually destroy the restrictions imposed in this provision and authorize alienation by the allottee. (*Williams v. Steinmentz*, 82 Pac. 989; *Cherokee Live Stock Association v. Mayes*, 51 Pac. 215; *Beck v. Flournoy Live Stock & Real Estate Co.*, 65 Fed. 30; *United States v. Flournoy Live Stock & Real Estate Co.*, 69 Fed. 886; *Goodrum v. Buffalo*, 162 Fed. 819.)

Section 155. Descent of allotted lands.

It is provided in the General Allotment Act, Section 841 hereof, “that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, etc.” The patent here referred to is no doubt the preliminary patent and the allotted lands become subject to the laws of descent and partition of the State upon the issuance of such preliminary patent. While, as a general rule of law, during the existence of the tribal government the property of a member of the tribe descends according to the law or custom of such tribe, it seems to have been the intention of Congress to change this rule by sub-

stituting the law of descent of the State or Territory in which the allotted lands are located for the tribal laws and customs.

In the absence of this particular provision, the authority conferred upon the Territory of Oklahoma by Section 6 of the organic act (26 Stat. 81) is sufficiently broad to authorize the territorial legislature to legislate with reference to the descent or succession of the lands situated within the Territory and held by title capable of passing by descent or succession and this without regard to whether the owner of said lands happens to be of Indian descent or otherwise. There are many reasons why the rule declared by the statute should be adopted. Very few, if any, of the Indian tribes in Oklahoma had written laws. Prior to allotment there was no such property subject to descent as lands or real estate in the proper sense of the term and it may be well doubted if any of the tribes had written laws affecting the descent or succession of real estate.

It is manifestly better to substitute the written laws of the State or Territory in which the lands are situated, having an established and well defined meaning for the customs of the tribe which rest in the memory of its members, and which must of necessity be more or less perverted to subserve the wishes of the members, party litigants to controversies over lands or other property passing by descent or succession.

A majority of the agreements for allotment of lands of the tribes in Oklahoma contain provisions for cession to the United States of all lands not allotted, thereby working a destruction of the tribal government and the tribal organization, and if the laws of the State were not applicable, the allottees of such tribes would be practically without any law of descent or succession. While it is not believed there is any reason to doubt that the laws of the State of Oklahoma relating to succession are applicable to the lands of allottees located therein; yet if there were a doubt as to which should apply, (the statutes of the State or the uncertain customs), the doubt should be resolved in favor of the Statutes. (*U. S. ex rel. C. O. & G. R. R. Co.*, 3 Okla. 482; *Guyatt v. Kautz et al.*, 83 Pac. 9; *Beam v. United States*, 162 Fed. 260.

Section 156. Descent and partition, continued.

The absence of record evidence of the marriage of members of Indian Tribes makes it difficult to determine who is entitled to inherit the estate of the allottee upon his death. In order

to obviate this difficulty and to establish the validity of marriages solemnized or entered into by members of an Indian Tribe in accordance with the laws and customs of such tribe, the Legislature of Oklahoma enacted a law, the provisions of which are found in Section 3499 and Section 3500 of Wilson's Statutes and which are as follows:

"(3499) That on the approval of this act, all Indians who have taken allotments of land in severalty, and who have their homes in this Territory, and who are living together as husband and wife, and who have, before that date, been married according to the Indian custom, are hereby declared to be lawfully married, and all divorces heretofore had among such Indians according to the Indian custom, shall be and the same are hereby declared to be legal.

"(3500) All children of such Indians as have taken allotments, born in, or begotten, in any Indian marriage existing prior to the passage of this act, shall be legitimate heirs of both the father and mother to whom they were born, notwithstanding the fact that the father and mother may have been divorced, and married to other persons, according to the Indian custom."

It will be noted that this statute recognizes marriage only in those cases where the parties were living together at the time of the passage of the law and who had previously thereto been married according to the Indian custom.

It was likewise declared that all divorces theretofore had among such Indians according to the customs of the tribe should be legal.

Section 157. Citizenship, state and national.

By the provisions of Section 6 of the General Allotment Act (Sections 775-776 hereof), upon the completion of the allotment and the issuance of a patent to an allottee, he becomes a citizen of the United States and of the State in which he resides, and subject to the laws, civil and criminal, of said state. It will be noted that citizenship is conferred not only upon members of Indian tribes who take allotments under the provisions of the General Allotment Act, but upon every Indian to whom an allotment is made, whether under the provisions of said act or under any law of or treaty with the United States. This act provides for the issuance of two patents, a preliminary one, declaring that the United States will hold the land in trust for a

given period, and a final patent to be excuted and delivered at the expiration of the trust period. There was for a long time a sharp controversy as to when an allottee became a citizen of the United States and subject to the laws of the State of his residence.

Representatives of the government of the United States persistently maintained that the government guardianship did not expire, and that the Indian did not become a citizen of the United States until the issuance of the final patent. This controversy was finally settled by the Supreme Court of the United States, *In re Heff*, 197 U. S. 488, that court speaking through Mr. Justice Brewer disposes of this contention in the following language:

"It is urged that this clause becomes operative only when the final patent provided for by section 5 is issued, but there are many reasons why such contention is unsound. In the first place, it is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of these Indians. If they were to continue in the same relation to the Government that they hitherto occupied, it would seem as though Congress would have said nothing and waited until near the expiration of twenty-five years before determining what should be such status. Second, the language of the first sentence of section 6 forbids the construction contended for. It is 'that upon the completion of said allotments and the patenting of the lands to said allottees.' Now the allotting and the patenting are joined together as though occurring at or near the same time. Further, when the first patent is issued, the recipient ceases to be an allottee and becomes a patentee. Again, the second patent does not always go to the holder of the first patent because, as provided by section 5, it may go to the first patentee or his heirs. And finally, the last sentence indicates that the whole section deals with present conditions and present rights. It reads: 'And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.' This confers citizenship upon the allottee and not upon the patentee, while at the same time securing to him his right to tribal or other property. So far as his political status is concerned

the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued. That citizenship is limited to the allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere.”

This decision seems to settle beyond controversy that the allottee becomes a citizen of the United States when the allotment is made and the preliminary patent issues.

Following this decision, however, Congress on the 8th day of May, 1906, enacted an amendment to Section 6 of the General Allotment Act, which postpones the time when the allottee becomes a citizen of the United States until the expiration of the trust period. Under the decision *In re Heff*, supra, this action would not destroy the rights of citizenship already vested under the provisions of the Act of 1887.

Under the amendment of May 8, 1906 (Section 859 hereof), the Secretary, in his discretion, may cause to be issued to any allottee a patent in fee simple before the expiration of the trust period and thereafter “All restrictions as to sale, incumbrance or taxation of said land shall be removed, but that said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.”

As to those members of the tribe to whom allotments had not been made at the time of the approval of this act, and who had not under some other treaty or law become a citizen of the United States, the rights of citizenship are postponed until the expiration of the trust period, or the issuance by the Secretary of the final patent.

This same act contains a further provision that until the issuance of fee simple patents, allottees shall be subject to the exclusive jurisdiction of the United States. Provisions of this amendment are not applicable to the Indians of what was formerly the Indian Territory. (*U. S. v. Auger*, 153 Fed. 671; *Bird v. Terry*, 129 Fed. 472; *U. S. v. Dooley*, 151 Fed. 697; *U. S. v. Paine Lum. Co.*, 206 U. S. 467; *Starr v. Campbell*, 208 U. S. 527.)

CHAPTER XXXIII.

AMENDMENTS TO ALLOTMENT ACT.

Section 158. Title of allottee as affected by amendments to general allotment act.

The amendment of 1891 to the General Allotment Act, Sections 831 to 838, deals largely with the amount of land to be allotted to the members of the various tribes. It provides for allotting, under the direction of the President, to each member of the tribe, one-eighth of a section of land. If there are not sufficient lands in the reservation to allot such an amount to each member, then each member is to receive in allotment such an amount as will constitute his pro rata share of the reservation.

In order to observe the agreements the Government had made with members of the various tribes, by which an amount in excess of eighty acres was to be allotted to the members of such tribes, it is provided that wherever under any special agreement an amount in excess of such eighty acres is agreed to be allotted to the members of a tribe, that such an agreement will be complied with notwithstanding the provisions of said act. It is further provided that where allotments are only valuable for grazing purposes, that such lands may be allotted in double quantities. Section 4 of said act permits the settlement by any Indian, entitled to an allotment under existing laws, upon any surveyed or unsurveyed lands in the United States not otherwise appropriated, and directs that upon application to the local land office, the Indian making such settlement on such public lands, shall be entitled to have the same allotted to him or her and to his or her children in the manner provided in the previous section. The public lands thus selected in allotment are to be patented and held subject to the provisions of the General Allotment act of 1887.

On May 8, 1906, the President approved an act amending the provisions of the General Allotment Act of February 8, 1887, in several particulars. (See Section 859). This Act, however, chiefly affected the title acquired by the allottee and the time when such allottee became a citizen.

Under the amendment of May 8, 1906, it is provided that

at the expiration of the trust period, as fixed in the General Allotment Act of 1887, and when the lands have been conveyed to the Indians by patent in fee, as provided in said Act, then such allottees shall have the benefits of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. This amendment contains the following proviso: "*Provided further*, that until the issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the conclusive jurisdiction of the United States; and, provided further, that the provisions of this Act shall not extend to any Indian in the Indian Territory."

It is further provided in the amendment that in case of the death of an allottee before the expiration of the trust period, or the issuance of the final patent, that the allotment may be cancelled, the land revert to the United States, and that the Secretary shall ascertain who the legal heirs of such deceased allottee are, and shall cause to be issued to such heirs, and in their names, a patent in fee simple for the land allotted to their ancestors. The Secretary may, if he prefers doing so, cause such allotment to be sold and issue a patent to the purchaser, and pay over the proceeds of the sale to the heirs of the deceased allottee.

Evidently the purpose of this act is to retain departmental control over the lands thereafter allotted until the expiration of the trust period, or until the issuance of a fee simple patent. The provision authorizing the cancellation of the preliminary patent, was evidently intended to destroy the possibility of the alienation by heirs of deceased allottees without the consent and approval of the Secretary of the Interior. The postponement of citizenship until the expiration of the trust period, or until the issuance of the patent in fee, was intended as far as possible to disqualify the allottee from making contracts touching his allotment. It is not believed that it was intended by this act to attempt to destroy citizenship acquired by virtue of a compliance with the provisions of previous acts, but merely to postpone the acquiring of citizenship by those members of the tribe who had not theretofore become citizens of the United States.

Section 159. Alienation; restrictions upon, expiration of.

By an amendment contained in the Appropriation Act approved June 21, 1906 (34 Stat. 326), it is provided "that prior

to the expiration of the trust period of any allottee to whom a trust or other patent, containing restrictions upon alienation, has been or shall be issued under any act, law or treaty, the President may, in his discretion, continue such restrictions upon alienation for such period as he may deem best; provided, however, that this shall not apply to lands in the Indian Territory." After the decision in the *Heff* case, those desiring that the department should retain control over Indian allotments, became active in securing legislation nullifying the effect of such decision.

The act of May 8, 1906, heretofore referred to, represents one effort in that line, and the provision above quoted, another. The above provision is possibly subject to constitutional objection where the allottee had become a citizen of the United States with all the rights, privileges and immunities of such and had received from the Government its obligation to convey the land by fee simple patent at the expiration of a given time. A further clause contained in the same bill (34 Stat. 327), provided that "no land acquired under the provision of this act shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the final patent in fee therefor." This is merely an exemption law, exempting the allotments from enforced alienation upon debts contracted prior to the issuance of the final patent. It is in no sense a restriction upon alienation. Congress undoubtedly had not only the right, but it was its duty to make such provision. The beneficial effect of prohibition against alienation would be very materially impaired if simple contract debts made during the period of incompetency could be converted into a means of enforced alienation, after the expiration of the trust period, or expiration of restrictions upon alienation.

Section 160. Alienation; restrictions upon, removal of.

There was contained in the Indian Appropriation Bill, approved May 27, 1902 (32 Stat. 275; 1 Kapp. Law and Treaties, 120; Section 861 hereof) a provision permitting the adult heirs of a deceased Indian to whom a trust or other patent containing restrictions upon alienation, had been issued, to sell the lands allotted to the deceased ancestor, subject to the approval of the Secretary of the Interior. Under this provision the act of the Secretary of the Interior in approving a sale, is in effect a re-

moval of restrictions. The question of whether or not the Secretary shall approve such sale, is left entirely in his discretion.

Inherited lands of the minor may be alienated, when sale is made through the proper probate court and approved by the Secretary of the Interior. However, the homestead in each instance is reserved from sale during the lifetime of the father, mother or the minority of any child or children. And it is therefore only in case where the allottee does not leave surviving a father, mother or child, that the sale of the homestead may be made; or, if such allottee has left surviving either one or all of the classes mentioned, the homestead may be alienated upon the death of all such persons. Neither the approval of the sale of the minor's interest in the lands by the court, nor such approval by the Secretary of conveyances by the adult heirs, or sales by the guardian for the minor heirs, determines the heirship of inherited lands, nor that there was not left surviving a father, mother or child. It is presumed, of course, that neither the court would order a sale nor the Secretary approve it, so far as the homestead is concerned, if there was left surviving father, mother or minor child. But no provision is made for determining whether or not there was left surviving such persons in either the proceedings for the sale of the land or in the approval by the Secretary. Nor would such proceedings be binding upon anyone not a party thereto. It therefore becomes necessary in determining the validity of a conveyance of inherited Indian lands to make an investigation independent of the proceedings in the probate court and of the approval of the Secretary of the Interior, to determine whether or not such deceased allottee left surviving him father or mother or minor child, where title to the homestead is involved. And as to either the homestead or lands in excess of the homestead, it is necessary to determine whether or not all of the heirs have joined in the conveyance. (*Reed v. Clinton*, 101 Pac. 1055.)

Section 161. Leases.

Section 3, of the Act of February 28, 1891, amending the General Allotment Act of 1887, contained the following provision (26 Stat. 795) :

“That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said Act, or any

other Act or treaty, cannot personally, and with benefit to himself, occupy or improve his allotment, or any part thereof, the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary for a term not exceeding three years for farming or grazing, or ten years for mining purposes."

The Supreme Court of Oklahoma, in the case of *Williams et al. v. Steinmetz et al.* (82 Pac. 986), construing this provision, used the following language:

"A lease of an Indian allotment, which has not been approved by the Secretary of the Interior, is absolutely null and void; and where a party under such a lease plants the land to corn and cultivates it, and the cattle of the allottee, in connection with the cattle of another, break down the fence and destroy such corn, the lessee cannot recover for the value of his share thereof. The lease having been made in violation of a positive statute, the law will grant him no relief."

"Act February 28, 1891, section 3 (26 Stat. 794, c. 383), does not authorize the leasing of the lands embraced within an Indian allotment, unless it is made to appear to the Secretary of the Interior that the allottee cannot, by reason of age or other disability, personally, and with benefit to himself occupy or improve his allotment or any part thereof."

Leases under this provision can be made only when the conditions mentioned in the statute arise, and must then be approved by the Secretary, and without his approval have no validity whatever. (*Larson v. First Nat'l Bank*, 87 N. W. 18; *Beck v. Flournoy L. S. & R. E. Co.*, 65 Fed. 30; *U. S. v. Flournoy L. S. & R. E. Co.*, 6 Fed. 886; *Light v. Conover* (Okla.), 63 Pac. 966; *Mayer v. Cherokee Strip L. S. Co.* (Kan.), 51 Pac. 217; *U. S. v. Flournoy L. S. R. E. Co.*, 71 Fed 576.

The form of lease prescribed by the Department of Interior almost uniformly contains a provision against assignment or sub-leasing without the consent of the Secretary of the Interior; and it was held in *Megreedy v. Macklin*, 73 Pac. 293, 12 Okla. 666, and *Reeves & Co. v. Sheets*, 16 Okla. 342, 82 Pac. 487, that such assignment or sub-lease made without the approval of the Secretary of the Interior is absolutely void, and passes no interest to the assignee or sub-lessee.

This is but a reaffirmation of the well-established rule of law that a contract in contravention of a positive statute, or valid rule or regulation, made pursuant thereto, is void.

CHAPTER XXXIV.

ABSENTEE SHAWNEES AND CITIZEN POTTAWATOMIES.

Section 162. Absentee Shawnees.

The lands of the Pottawatomies located in the State of Oklahoma, were acquired pursuant to the provision of the treaty of 1867 (15 Stat. 531) and those of the Absentee Shawnees were acquired from the United States under the act of May 23, 1872 (17 Stat. 159), and each of the tribes continued to occupy its reservation as tribal property until March 3, 1891. Perhaps prior to that time some parts of the reservation of each of these tribes had been allotted in severalty to certain members of the tribe pursuant to the General Allotment Act of 1887. On March 3, 1891, the President approved the Indian Appropriation Act for the fiscal year ending June 30, 1892, containing an agreement with the Absentee Shawnees providing for the cession by the said tribe to the United States of all its right, title and interest in and to the reservation. (26 Stat. 989; Kapp. Laws and Treaties, Vol. 1, p. 412.) This agreement, however, reserved out of the lands so ceded an allotment for each member of the tribe. There is no provision in this agreement as to the amount of land which each member shall receive in allotment.

Article 2 of said Act, confirming previous allotments, providing an allotment for each member of the tribe who had not previously thereto received an allotment, and making provision for the passing of title to the allottee and imposing restrictions upon alienation, is as follows:

“Whereas certain allotments of land have been heretofore made, and are now being made to said Absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress entitled, ‘An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes,’ approved February 8, 1887, and according to said instructions other allotments are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of

being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, locations and area, as those heretofore made, and when made shall be confirmed. When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned Act of Congress. Provided, that in all allotments to be hereafter made, no person shall have the right to select his or her allotment in section sixteen (16) and thirty-six (36) in any Congressional township—nor upon any land heretofore set apart in said tract of country for any use by the United States, or for school, school farm or religious purposes—nor shall said section sixteen (16) and thirty-six (36) be subject to homestead entry, but shall be kept and used for school purposes; nor shall any lands set apart for any use of the United States, or for school, school farm or religious purposes, be subject to homestead entry—but shall be held by the United States for such purposes, so long as the United States shall see fit to so use them: and provided further, that all such allotments shall be taken on or before January 1, 1891, after which time and up to February 8, 1891, the allotting agent then on said reservation shall make allotments to those Absentee Shawnees, resident in said tract of country, who have failed or refused to take their allotments as aforesaid, and such allotments so made by such allotting agent shall have the same force and effect as if the selections were made by the Indians in person. After said date of February 8, 1891, any right to allotment hereunder or by Act of Congress, shall be deemed waived and forever cease to exist.”

This is the only provision of the agreement affecting the character of title passing to the allottee or imposing restrictions upon alienation. The result of this article is to apply to the allottees of the tribe in the fullest sense the provisions of the General Allotment Act of February 8, 1887, which have been fully discussed in the chapter (XXX) entitled “General Allotment Act.”

Section 163. Citizen Pottawatomies.

The same appropriation bill which contained the allotment agreement made with the Absentee Shawnees contained a similar agreement with the Citizen Pottawatomies. (See 1 Kapp., Laws and Treaties, p. 409.)

The provisions of the agreement with the Citizen Band of Pottawatomies in so far as allotment, the passing of title and the imposition of restrictions upon alienation are concerned, are identical with the provision of the agreement with the Absentee Shawnees. The only difference in the two agreements being as to the time when allotment shall be completed. It is therefore not deemed necessary to reproduce the provisions of such agreement.

The matters relating to descent, citizenship, and restrictions upon alienation, and other matters discussed under chapters entitled "General Allotment Act" and "Amendments to General Allotment Act" are applicable to the allottees of the Absentee Shawnees and Citizen Pottawatomies, except as controlled by certain provisions hereinafter referred to.

Section 164. Subsequent legislation affecting both tribes.

On August 15, 1894 (28 Stat. 286, 1 Kapp., L. and T. 520) there was included in the Indian Appropriation Bill the following provision :

"That any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the Act approved February eight, eighteen hundred and eighty-seven (Twenty-four Statutes, three hundred and eighty-eight) and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to approval by the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another State or Territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named. And the land sold and conveyed under the provisions of this Act shall, upon proper recording of the deeds therefor, be subject to taxation as other lands in said Territory, but neither the lands covered by such patents not sold and conveyed under the provisions of this Act, nor any improvements made thereon, shall be subject to taxation in any manner by the Territorial or local authorities during the period in which said lands shall be held in trust by the United States."

That in Section 7 of the Act of May 31, 1900 (31 Stat. 221-248; 1 Kapp., L. & T., 701) it is provided:

"That the proviso to the Act approved August fifteenth, eighteen hundred and ninety-four, permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands, then such minors may join in a sale thereof by a guardian, duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior; and any Citizen Pottawatomie or Absentee Shawnee not residing upon his allotment, but being an actual resident of another State or Territory, may in like manner sell and convey all the land allotted to him."

This seems to be all the special legislation affecting either the Absentee Shawnees or Citizen Pottawatomies. The allottees of said tribes are, however, subject to all the general legislation enacted with reference to tribal Indians where the same is not in conflict with the special agreements above set out and the special legislation referred to.

CHAPTER XXXV.

KICKAPOOS.

Section 165. Tribal citizenship and allotment.

The Kickapoos acquired their reservation in Oklahoma by authority of a proclamation issued by the President of the United States on the 15th day of August, 1883, ordering that a certain tract of country be and the same is hereby set apart for the permanent use and occupation of the Kickapoo Indians (1 Kappler, Laws and Treaties, 844.)

On the 3rd day of March, 1893, the President approved an Act ratifying and confirming an agreement with the Kickapoo Indians, providing for the cession of the lands of the Tribe to the United States, but reserving out of the lands so ceded, a sufficient acreage to supply each member of the tribe with an eighty acre allotment. (27 Stat. 557; 1 Kappler's Laws and Treaties, 480).

Citizenship in the Tribe was determined and allotment was made under the provisions of the Allotment Agreement, by the Secretary of the Interior.

Section 166. Restrictions upon alienation.

Section 4 of the treaty providing for the allotment in severalty of the lands of the Kickapoos, contains the following provision with reference to the manner in which the lands so allotted shall be held and the restrictions imposed upon alienation.

“When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the benefit of the allottees, respectively, for a period of twenty-five (25) years, in the manner and to the extent provided for in Act of Congress entitled ‘An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes.’ Approved February 8, 1887.

“And at the expiration of the said twenty-five (25) years the title thereto shall be conveyed in fee simple to the

allottees or their heirs, free from all incumbrances, provided the President may at the end of the said period extend the time the land shall be so held, in accordance with the provisions of the above recited Act."

The effect of the provisions of the General Allotment Act, imposing restrictions upon alienation, have heretofore been fully discussed. Apparently from the language used, the General Allotment Act controls in all matters relating to the disposition of the lands of Kickapoo allottees, except where modified by subsequent congressional legislation.

Section 167. Alienation, removal of restrictions upon.

The Indian Appropriation Bill, approved June 21, 1906 (34 Stat. 363), contains the following provision, referring to the Kickapoo, Shawnee, Delaware, Caddo and Wichita Indians:

"All restrictions as to sale and incumbrance of all lands, inherited, and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo and Wichita Indians, who have heretofore been or who are now, known as Indians of said tribes affiliating with said Kickapoo Indians now or hereafter nonresident in the United States who have been allotted land in Oklahoma or Indian Territory, are hereby removed; provided, that any such Indian allottee who is a non-resident of the United States may lease his allotment without restrictions for a period of not exceeding five years; Provided, further, that the parent, or the person next of kin, having the care and custody of a minor allottee, may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee."

What is the effect of the declaration by Congress that "All restrictions as to sale and encumbrance of all lands, inherited and otherwise, . . . are hereby removed." Trust patents had been issued to these allottees and the trust period had not expired. Was it the purpose of Congress to authorize the immediate alienation by allottees of the Kickapoo Tribe who were "nonresident" of the United States? If not, what was the purpose of this provision? It has been contended by counsel for the Government of the United States that this provision does not permit such immediate alienation; that the Kickapoo allottee is not the owner of the land allotted to him; that restrictions upon alienation can exist only where there is title and that the

Kickapoo allottee not having title, there could not exist restrictions upon alienation in the ordinary sense of the term. The logical result of the contention of the government would be to destroy the authority of the national government to impose restrictions upon alienation where the title had not passed out of the United States.

Every interest in real estate, whether a fee title or less, when accompanied by present possession is capable of alienation in the absence of prohibition by some positive statutory provision, or perhaps in a proper case by contractual provision. This being true, why could not any estate which is alienable be subject to the imposition of restrictions upon alienation? A restriction upon alienation in the sense in which the word "restriction" is used in acts imposing restrictions upon alienation by allottees of Indian Tribes is "any legal impediment to the right to alienate." It makes no difference what form the impediment takes, if it prohibits alienation or limits or interferes therewith, it is a restriction upon alienation, and therefore, the removal of all restrictions upon alienation and encumbrance is a removal of every legal impediment to alienation or encumbrance. It is a striking down of that which renders it unlawful to alienate. A reservation of the title or declaration of trust for the benefit of the allottee or a condition imposed, may be restrictive of the right to alienate, and in so far as such trust provision, reservation, or condition, may operate to prevent alienation, it is destroyed by a provision in a statute removing all restrictions upon alienation.

The Supreme Court of the United States, discussing a somewhat similar provision, the case of *Barney v. Dolph*, 97 U. S. 656, uses the following language:

"The prohibition of sales, although contained in Section 4, applied to all persons entitled to the benefit of the act, and its repeal was, under the circumstances, equivalent to an express grant of power to sell. The Prohibition was of the sale, before patent, of the land to which the settler was entitled under the act. The repeal, therefore, operated under the circumstances the same as a grant of power to sell the land even though a patent had not issued. This, in the absence of any thing to the contrary, implied the power to convey all the government had parted with."

If Congress did not, by the provisions of this Act, intend to authorize the immediate alienation of allotted lands by the class of allottees mentioned therein, what was its purpose? If it did not authorize such alienation, did it accomplish anything? After a most careful consideration of this provision it is impossible to reach the conclusion that Congress could have intended to accomplish anything else other than to authorize immediate alienation by the allottees mentioned. The language is sufficiently broad to authorize such alienation. No other result could have been contemplated, and Congress, therefore, must of necessity, have intended to do what the language implies; remove all legal impediments to the immediate alienation by the allottees mentioned, of the lands allotted to them as members of the Kickapoo Tribe of Indians.

No one seems to have undertaken to give a judicial definition of the phrases "restrictions upon alienation" and "removal of restrictions upon alienation" or either of them. It is with much diffidence that an attempt has been made to give a definition of these phrases, if what has heretofore been said may be treated as a definition. Their meaning, however, has become of such controlling importance in determining whether an Indian allottee may alienate the land received by him in allotment as to demand that they be correctly interpreted and fully understood. The use of the word "restriction" in connection with alienation of lands seems to have had its origin in the English Land Transfer Act of 1745. A restriction under the terms of that Act is an entry on the register by the registered proprietor of land, the effect of which is to prevent a transfer of same or the creation of any charge thereon, unless notice of the application for the transfer or charge should be given to the proprietor, or the consent of some designated person or persons to the transfer or charge be first obtained.

The purpose of this provision in the English Land Transfer Act seems to have been not only to protect the owner against his own acts but to prevent the clouding of his title by conveyances executed and placed of record by other persons asserting ownership of the land.

Discussing the provisions of the Act of April 21, 1904, removing restrictions upon alienation and the scope and meaning of such provisions, Judge Campbell in *Moore v. Sawyer*, 167 Fed. 835, uses the following language:

"Counsel have presented very elaborate and ingenuous briefs upon the proposition that the act of April 21, 1904, removing restrictions upon alienation, did not affect the matter of leasing, on the theory that leasing is not in any sense an alienation. The question is, What did Congress intend? And if that intent can be determined from a consideration of the legislation itself and the circumstances under which it arose, then we need not consume the time and labor incident to examining decisions of other states, where, under different circumstances, the technical terms involved have been variously construed. By Section 16 of the supplemental agreement, above quoted, Congress restricted the alienation of lands for certain periods. Note the language:

" 'Lands allotted to citizens shall not . . . be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, . . . ' etc.

"This is the only section of the act placing restrictions upon the disposition of their lands by allottees. Then follows section 17, providing that citizens may rent their allotments under certain terms and conditions. This express permission to rent clearly implies that but for such permission the right to rent or lease would not exist. But why would it otherwise not exist? Clearly, only because of the sweeping restriction upon alienation contained in the preceding section. By the act of April 21, 1904, this restriction as to adult allottees not of Indian blood was removed except as to homesteads. It follows that if the restrictions imposed by section 16 comprehended renting or leasing, making the permissive clause of section 17 necessary, then the repeal of Section 16 by the act of April 21, 1904, gave those affected by the act the same right to lease as to otherwise alienate. Such, in my opinion, is a fair and reasonable construction of the legislation. In my opinion, freedom to rent or lease their allotments without restriction was extended to all allottees of the Five Civilized Tribes affected by the act of April 21, 1904, to the same extent as said act removed from them the restrictions upon disposition otherwise. Such is the interpretation now placed upon this act by the Secretary of the Interior, and this departmental construction, while not controlling, is entitled to great weight. (*Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Farrel v. U. S.*, 110 Fed. 942, 49 C. C. A. 183.) The act approved May 27, 1908 (Act May 27, 1908, c. 199, 35 Stat. 312), entitled 'An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes,' is the

last expression of Congress on the subject of alienation and leasing, and a careful study of that act confirms the conclusion that Congress in its use of the term 'alienation' intended it to include the leasing of lands, treating a lease as a species of alienation. This is the construction given this act by the Supreme Court of this State, as recently decided in the case of *Eldred v. Okmulgee Loan & Trust Co.* (not yet officially reported), 98 Pac. 929, and is, I think, in accord with the history and spirit of all congressional legislation looking to the allotment of these lands in severalty and the dissolution of these tribal governments. It follows that the approval of the Secretary of the Interior was not essential as to the validity of the lease of the complainant, Moore, to the United States Loan & Trust Company, except as to that portion of the land comprising the homestead."

The Supreme Court of the State of Oklahoma in the case of *Godfrey v. Iowa Land & Trust Company*, 95 Pac. 803, had under consideration the same provision and arrived at the same conclusion as did Judge Campbell. (See Sec. 37).

The matters not discussed in this Chapter relating to Kickapoos have received consideration in the discussion of the General Allotment Act. This Act and the amendments thereof, control, except in the particular referred to. It is therefore not necessary, to here discuss the subject of Descent, Citizenship (State and National), Conveyances in violation of the Statute, and other subjects discussed under the General Allotment Act and the amendments thereof.

Restrictions upon alienation by individual Kickapoo allottees have been removed by subsequent acts of Congress. The language of removal in most instances is substantially the same as that under consideration in this and the preceding section. It is not, however, the purpose of this work to deal with acts of Congress removing restrictions upon individual alienation.

The provisions above discussed seem to constitute all the special legislation enacted with reference to the Kickapoos. What is said in Chapter XXXII, entitled "General Allotment Act" and the Chapter XXXIII, entitled "Amendment to General Allotment Act" is applicable to the Kickapoo allottees where not in conflict with the provisions of the special allotment agreement, under which the tribal lands were allotted, or special legislation thereafter enacted.

CHAPTER XXXVI.

CHEYENNES, ARAPAHOES, KIWAS, COMANCHES AND APACHES.

Section 168. Cheyennes and Arapahoes.

The Cheyennes and Arapahoes acquired title to their reservation by treaty entered into October 28, 1867, and ratified July 25, 1868, proclaimed August 19, 1868. (15 Stat. 593; 1 Kapp. 839-40.) The tribes continued to reside upon these lands and to hold the same in common until the 31st day of March, 1901. On that date the President approved the Indian Appropriation Bill, there being contained in said Bill as Section 13 thereof, an agreement for the allotment in severalty of the tribal lands of said tribes. (1 Kapp. 417.)

Provision was made for the allotment in severalty of one hundred and sixty acres of land to each member of the tribe over eighteen years of age and the remainder of the reservation was ceded to the United States. Article 6 of this Treaty provided for the issuance of a trust patent very similar to that issued to allottees under the General Allotment Act and to the Kickapoos, Kiowas and Comanches, but slightly different therefrom. The provision is as follows:

“When said allotment of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five years, in the manner and to the extent provided for in the Act of Congress entitled ‘An Act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and of the Territories over the Indians, and for other purposes,’ approved February eighth, eighteen hundred and eighty-seven; and at the expiration of said period of twenty-five years the titles thereto shall be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances.”

The provisions of this agreement are so similar to those of the General Allotment Act, that it is not believed that they are susceptible to a construction differing therefrom. There does not seem to have been any special legislation subsequently enact-

ed, affecting the allottees of the Cheyenne and Arapahoe tribes. The allottees of said tribes, however, are subject to such general legislation subsequently enacted as is applicable to the allottees of the various Indian tribes.

For discussion of the subjects generally, relating to and affecting Cheyenne or Arapahoe allottees, see Chapter XXXII, entitled "General Allotment Act," and Chapter XXXIII, entitled "Amendment to Allotment Act."

Section 169. Kiowas, Comanches and Apaches.

The Kiowas, Comanches and Apaches held their reservation by the ordinary tribal title and occupied the same in common until the 6th day of June, 1900, when the President approved an Act entitled "An Act to Ratify and Confirm Agreement made with the Kiowas, Comanches and Apaches," etc (31 Stat. 672-676; 1 Kapp. 710).

Under the terms of this agreement allotments were to be made to members of the tribe; reservation was made for pasture lands and the remaining lands ceded to the United States. Each member of the Tribe, over the age of eighteen years was to receive an allotment of one hundred and sixty acres. The validity of this agreement was contested by certain members of the Tribe upon the ground that it had not been ratified by the requisite number of members thereof. The Supreme Court of the United States in disposing of this question, in *Lone Wolf v. Hitchcock*, 187 U. S. 553, uses the following language; quoting from syllabus:

"In view of the legislative power possessed by Congress over treaties with the Indians, and Indian Tribal property, even if a subsequent agreement or treaty purporting to be signed by three-fourths of all the male Indians was not signed, and amendments to such subsequent treaty were not submitted to the Indians, as all these matters were solely within the domain of the legislative authority, the action of Congress is conclusive upon the courts.

"As the Act of June 6, 1900, as to the disposition of these lands was enacted at a time when the tribal relations between the confederated tribes of the Kiowas, Comanches, and Apaches still existed, and that statute and the statutes supplementary thereto, dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or re-

served for their benefit, such legislation was constitutional, and this court will presume that Congress acted in perfect good faith and exercised its best judgment in the premises, and as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of such legislation."

The provisions of the agreement imposing restrictions upon alienation and fixing the character of title acquired by the allottee are somewhat different from that relating to any of the other Indian Tribes.

These subjects are covered by Article 5 of the agreement referred to, which is as follows:

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner, and to the extent provided for in the Act of Congress entitled 'An Act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February 8th, 1887, and an Act amendatory thereof, approved February 28, 1891.

"And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances."

It will be noted that this treaty contains no provisions permitting the President to extend the restrictions upon alienation beyond the period fixed in the Act.

The language of this agreement makes the provisions of the General Allotment Act and the amendment thereto of 1891 applicable to the allottees of the Kiowas, Comanches and Apaches. What is said in the two chapters relating to this subject is applicable to the allottees of the Kiowa, Comanche, and Apache tribes. The subsequent general legislation is also applicable to the allottees of these tribes, both as to allotted and inherited lands.

The Kiowas, Comanches and Apaches are subject to the general legislation discussed in Chapter 31, entitled "Tribal Title and Citizenship," Chapter 32, entitled "General Allotment Act" and Chapter 33, entitled "Amendments to Allotment Act"

CHAPTER XXXVII.

PONCAS, PAWNEES AND TONKAWAS.

Section 170. Poncas.

The lands of the Ponca reservation were allotted to the members of the Ponca Tribe of Indians under the General Allotment Act of 1887 and amendment thereto. They are also subject to such other general legislation as may have been enacted relating to the Indians in Oklahoma and to the allottees of such tribes.

These subjects are fully discussed in Chapter 31, entitled "Tribal Title and Citizenship," Chapter 32, entitled "General Allotment Act," and Chapter 33, entitled "Amendments to Allotment Act."

There does not seem to have been any special legislation with reference to the allottees of the Ponca Tribe.

Section 171. Pawnees.

Allotments were made to members of the Pawnee Tribe of Indians under an agreement made and entered into by and between the United States and such tribes and approved by Section 12 of the Indian Appropriation Bill of March 3, 1893. (27 Stat. 644; 1 Kapp. 496.) Allotments to members of this tribe were made pursuant to said agreement by direction of the President under the General Allotment Act.

The provision of the Pawnee agreement relating to the subject of allotment and restrictions upon alienation is as follows:

"It is agreed that the allotments of land made and to be made, under such direction of the President, shall in all things be confirmed. The title to the allotments so made shall in all things, except as herein otherwise expressly provided, be governed by all the conditions and limitations contained in the law of Congress, entitled 'An Act to provide for the allotment of land in severalty to Indians on the various reservations and to extend the protection of the laws of the United States over the Indians, and for other purposes,' approved February 8, 1887, and an Act amendatory thereof, approved February 28, 1891."

There are no exceptions in the agreement affecting the character of title passing to the allottee under the general allot-

ment act or affecting the restrictions imposed thereon upon the alienation by the allottee of lands selected in allotment. There is a further provision that "all members of said tribe who shall be born prior to the final completion of the allotting of such lands, as herein provided for, shall have the right to allotments under this agreement, and the allotments made or to be made by such allotting agent, shall continue in force and be confirmed even if the allottee shall die before the final completion of such allotting, and in such cases the law of partition and descent of the State or Territory, wherein such land is situated, shall govern."

There does not seem to have been any special legislation affecting the allottees of the Pawnee tribe. What is said in Chapter 32, entitled "General Allotment Act," and Chapter 33, "Amendments to General Allotment Act" is also applicable to the Pawnee tribe of Indians. All subsequent legislation, enacted with reference to the allottees of Indian Tribes generally, is applicable to the Pawnees as to both their allotted and inherited lands.

Section 172. Tonkawas.

The lands of the Tonkawas were allotted pursuant to an agreement made and entered into by and between the United States and said tribe and ratified by Congress on the 3rd day of March, 1893. (27 Stat. 644; 1 Kapp. 495). Article 2 of this agreement is as follows:

"The allotments of lands to said Tonkawa tribe of Indians, made and completed by Miss Helen P. Clark an allotting agent, duly appointed for the purpose, during the summer of the year 1891, shall be confirmed to said Indians respectively, and governed by all the conditions, qualifications, and limitations recited in a certain act of Congress, entitled 'An Act to provide for the allotment of lands in severalty to the Indians on the various reservations and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February 8, 1887, and An Act amendatory thereof, approved February 28, 1891; provided that in all cases where the allottee has died since said allotting agent set off and scheduled land to such person the law of descent and partition in force in Oklahoma Territory shall apply thereto, any existing law to the contrary notwithstanding."

Article 5 of this Agreement is as follows:

"Indians who by nativity belong to other tribes, but who have abandoned such other tribes, and have been adopted by and are now living with and recognized as members of said tribe by said Tonkawa tribe of Indians, shall have all the rights under this agreement provided for members of said tribe by nativity, and all payments of money provided for herein shall be made, as nearly as practicable, per capita to all members of said tribe, native and adopted."

It is unnecessary to discuss the subject of Alienation, Descent and Distribution and Conveyances in violation of statutes prohibiting alienation, as the Tonkawa allottees are governed by the General Allotment Act and the amendments thereto, under which heads all of these subjects have been discussed.

Such allottees are also subject to all the general legislation applicable to the allottees of Indian tribes and which relates to their allotted or inherited lands.

CHAPTER XXXVIII.

KANSAS OR KAW INDIANS.

Section 173. Kansas or Kaws.

By the provisions of an Act of Congress, approved June 5, 1872 (17 Stat. 228; 1 Kapp., Laws and Treaties page 138) it was provided:

“That said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians.”

On July 10, 1902, the President approved “An Act to accept, ratify and confirm a proposed agreement submitted by the Kansas or Kaw Indians of Oklahoma, and for other purposes.” (32 Stat. 636; 1 Kapp., Laws and Treaties, 766.)

Section 1 of this agreement fixes the membership in the tribe of members entitled to an allotment of land in severalty as those appearing upon the roll as shown by the records of the United States in the office of the Indian Agent at the Osage agency on December 1st, 1901, and all descendants born prior to 1902 to those whose names appear upon the roll of 1901.

Section 2 provides that all the lands belonging to the Kansas or Kaw tribe of Indians in the Territory of Oklahoma, except as provided in said agreement, shall be divided among the members of the tribe giving to each his or her fair share thereof.

Paragraph 1 of Section 2 provides that there shall be set aside to each member of the tribe “one hundred and sixty acres of land for a homestead, which shall be nontaxable and inalienable for the period of twenty-five years from the first day of January, 1903, except as hereinafter provided.” Homesteads previously selected were confirmed.

Paragraph 2 of Section 2 provides that after each member has selected his or her homestead the remaining lands belong-

ing to said tribe shall be divided equally, in acreage among the members of the tribe.

"The lands, other than the homestead, set aside to each member, shall be free from taxation as long as the title remains in said member, but in no event to exceed twenty-five years, and the same shall not be sold or encumbered in any way before the expiration of ten years from the date of the deed to said member, except as herein provided and with the approval of the Secretary of the Interior, and it shall be his duty to carefully investigate each sale or transaction before he approves the same; provided, that the lands of minors shall be inalienable during their minority. . . ."

Sections 3 and 4 deal with the manner of selecting allotments.

Section 5 provides that the Secretary of the Interior shall furnish the head chief of the tribe with deeds for the conveyances provided for, and said head chief shall thereupon, and in the presence of the agent, proceed to execute said deeds, and said deeds when executed shall be delivered to the United States Indian Agent in charge of the Tribe, who is required to see that the deeds are properly delivered to the members entitled to the same. A separate deed is required to be given for the homestead. If the agent is unable to deliver such deed to any allottee, he is required to have the same properly recorded in the office of the register of deeds in the county in which the land is located.

Section 6 is as follows:

"All deeds shall be approved by the secretary of the Interior, which approval, and the signing of the same by the head chief, shall operate as a relinquishment to the individual member of all the right, title, and interest of the United States and of the Kansas or Kaw tribe of Indians (as a tribe) in and to the lands embraced in his or her deed."

The Indian agent is given exclusive jurisdiction to settle all disputes between the parties as to who is entitled to select any particular parcel or tract of land in allotment.

Section 10 of said agreement is as follows:

"The Secretary of the Interior may, in his discretion, at the request of any adult member of said tribe, issue a certificate to such member authorizing him to sell and con-

vey any or all lands deeded him by reason of this agreement and may pay such member at the next annual payment his or her pro rata share of the funds of said tribe, if, upon consideration and examination of the request, the said Secretary shall find said member to be fully competent and capable of managing and caring for his or her individual affairs; provided, that upon the issuance of said certificate, the lands of such member, both homestead and surplus, shall become subject to taxation, and such member shall have the right to manage and dispose of such property the same as any other citizen of the United States, and upon the issuance of said certificate and the payment of the funds due him or her such member shall be dropped from the rolls of said tribe."

This seems to be the only reference to the subject of citizenship in the United States contained in this agreement.

Section 11 of the agreement is as follows:

"That the adult heirs of any deceased Kansas or Kaw Indian, whose selection has been made or to whom a deed has been issued for his or her share of the lands of said tribe in Oklahoma Territory, may sell and convey the lands inherited from such decedent; and, if there be both adult and minor heirs of such inherited lands, then such minors may join in a sale thereof by a guardian duly appointed by the proper court of the county in which said minor or minors may reside, upon an order of such court made upon petition filed by such guardian; all conveyances made under this provision to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The simplicity and clearness of the provisions of this agreement are to be commended. Other agreements made at the same time and with other tribes, and apparently drawn with much care, have resulted in expensive litigation, the effect of which has been to disturb all business in the nations in which the lands are situated, reduce the sale price of lands to the Indians and destroy confidence in titles.

On the 3rd day of March, 1909, the President approved an Act authorizing the Secretary of the Interior to sell part or all of the surplus lands of members of the Kaw or Kansas and the Osage tribes of Indians in Oklahoma. The provisions of this act are discussed in Section 177 in the chapter dealing with the Osages.

CHAPTER XXXIX.

OSAGES.

Section 174. Tribal title.

The Osages, upon their removal from Kansas, were located upon lands purchased by the United States from the Cherokees and supposed to be West of the ninety-sixth meridian. Subsequently it was discovered that the larger part of this reservation, as selected, was east of the ninety-sixth meridian. Provision was made for removal west of the ninety-sixth meridian by Act of Congress, approved June 5, 1872 (17 Stat. 228; 1 Kapp., Laws and Treaties, 137). This Act, after reciting the vicissitudes of the Osages and their endeavor to secure a permanent location, continues as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely; bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas: *Provided*, that the location as aforesaid shall be made under the provisions of article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: And *Provided further*, that said Great and Little Osage Tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas tribe of Indians, with lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians."

The Osage Indians purchased and paid for their lands. The expression "and the same is hereby set apart for and confirmed as their reservation" has been uniformly considered to operate as a grant *in praesenti* of the lands described. The Osages, therefore, held more than the ordinary tribal title to their tribal lands and this is evidenced by the fact that in the allotment of the lands the Tribal Chief, and not the United States, executes the patents.

Section 174a. Citizenship.

Under the provisions of an Act of Congress approved January 28, 1906 (34 Stat. 539), the lands of the Osage Nation are to be allotted among the members thereof, so that each and every member shall receive his or her fair share thereof in acres. Those entitled to participate are to be determined under the provisions of said Act as follows:

That the roll of the Osage tribe of Indians as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the 19th day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first nineteen hundred and seven, to persons whose names are on said roll on January first nineteen hundred and six, and all children whose names are not now on said roll, but were born to enrolled members prior to January first, nineteen hundred and six, including those resulting from the intermarriage of an Osage woman and a white man. Provision is made for expunging from the tribal rolls all names of such persons as might have been placed thereon by fraud. The jurisdiction to hear and determine who is entitled to enrollment, subject to the provisions of said Act, are conferred upon the Secretary of the Interior.

The provisions of the Act of Congress of August 15, 1894 (28 Stat. at Large, 305), "granting persons of Indian blood who have been denied allotments, the right to appeal to the courts" for relief, in so far as the same apply to the Osages is repealed.

Section 175. Allotment.

Under the provisions of Section 2 of the Act above mentioned, the lands belonging to the Osage tribe of Indians, ex-

cept certain lands reserved, are to be divided among the members of the tribes in the following manner:

Each enrolled member to select one hundred and sixty acres of land as a first selection, the adult members to select their first selection within three months after the approval of the Act. All selections made before the approval of the Act and which had not been contested were ratified and confirmed. Selections for minors are to be made by the Indian Agent, subject to approval by the Secretary. In selecting an allotment no member is permitted to select land already selected or in the possession of another member of the tribe, as a first selection, unless such other member is in possession of more land than he and his family are entitled to hold as first selections under the Act. Ownership of improvements is recognized as giving a prior right to select an allotment. It is evidently contemplated that each and every member should make a first selection of one hundred and sixty acres before any member would be permitted to make a second selection. After the first selection is completed a second selection of a like number of acres is to be made and then a third selection of like amount. After making the third selection the member is required to designate his homestead; the homestead and the surplus lands having imposed thereon different terms of restriction upon alienation. The lands so allotted are to be conveyed to the individual allottee by deed executed by the principal Chief and approved by the Secretary of the Interior.

Section 176. Alienation—restrictions upon.

The provisions with reference to alienation contained in this agreement are as follows:

“Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member shall be known as surplus lands and shall be inalienable for twenty-five years, except as hereinafter provided.” Under the first provision restrictions upon alienation continue until removed by Act of Congress; under the

last provision they continue for twenty-five years, unless removed under some other provision of the Act or by subsequent legislation.

The seventh paragraph of this treaty is as follows:

“That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; And provided further, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.”

The provisions of Section 7 invest the Secretary of the Interior with the discretion of issuing a certificate of competency, the effect of which is the immediate removal of all restrictions upon the alienation of the surplus allotment and to reduce the restrictions upon the alienation of the homestead of the allottee so that the same will cease at the expiration of twenty-one years or upon the death of the allottee. However, on the 30th day of March, 1909, the President approved an Act providing for the sale of the surplus lands of the Osages and Kansas or Kaws. While the provisions of Section 7 and the Act

of March, 1909, are not necessarily in conflict, and apparently the Secretary may exercise the authority conferred by either or both of said acts, he appears to regard the procedure provided for in the latter act and discussed in a subsequent section as more satisfactory. It keeps the matter of the disposition of the lands under the control of the Secretary until after the sale is completed and the purchase price paid.

Section 177. Alienation, when and how permitted.

On March 3, 1909, the President approved an Act authorizing the Secretary of the Interior to sell part or all of the surplus lands of members of the Kaw or Kansas and Osage Tribes of Indians in Oklahoma, which bill is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that the Secretary of the Interior be, and he hereby is, authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and the Osage Tribes of Indians in Oklahoma: Provided, that the sales of the Osage lands shall be subject to the reserved rights of the tribe in oil, gas, and other minerals."

Under the provisions of this act, the Secretary of the Interior has prescribed rules and regulations for sale of the surplus lands of the allottees of the Kansas or Kaw and Osage Tribes of Indians in Oklahoma.

The proceedings for sale are initiated by an application made through the Osage Agency at Pawhuska. The application must contain an agreement that the land shall be sold on such terms and conditions as may be prescribed by the Secretary and that the proceeds of the sale shall be handled and disposed of for the benefit of the applicant in such manner as the Commissioner of Indian Affairs may direct.

The approval of the sale and the issuance of the certificate is a sufficient showing that the rules and regulations of the department have been complied with.

Departmental regulation of the sale of the surplus lands of Kansas or Kaw and Osage allottees has been subject to frequent changes. It is desirable, where seeking to secure the approval of the sale of the surplus lands of a member of either of these tribes, to secure a copy of the latest regulation and

literally comply with same. If the rules and regulations are not observed, the Secretary will neither order nor approve a sale.

Section 178. Descent.

Section 6 of the Act for the division of the lands of the Osages (34 Stats. 545) is as follows:

“That the lands, moneys and mineral interests herein provided for, of any deceased member of the Osage Tribe, shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally.”

This act became a law June 28, 1906, after the enabling act and before the admission of Oklahoma to statehood. Was it within the power of congress to enact a statute of descent to remain in force in the State of Oklahoma indefinitely? Apparently it was the intention of congress to do so, because it specifically provides that the statute of the State or Territory, to be thereafter created, shall apply, with the exceptions mentioned.

On the 20th day of March, 1909, the Governor of the State of Oklahoma approved an act amending the laws of descent in force in the State of Oklahoma, so as to make exactly the same provision in case where a decedent leaves no issue nor husband nor wife, as is made in section 6 of the Allotment Agreement, *supra*. This act goes into effect on the 12th day of June, 1909. The provision referred to is found in the second paragraph of said act and is as follows:

“If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares.”

As long as the provision with reference to descent is the same in both the agreement and the Oklahoma Statute, there can, of course, arise no question as to which shall prevail. If the Legislature, however, should in the future, see fit to further amend the statutes of descent in force in this State, and should provide a different rule from that now provided in the particular matter referred to, which law would prevail, that of the State

of Oklahoma or of the Congressional act? This is a question of no great importance and one which, of course, at the present time, is a matter purely of speculation, except that actual cases may have arisen between the admission of Oklahoma to statehood and the going into effect of the amendment above referred to.

CHAPTER XL.

IOWA AND SAC AND FOX.

Section 179. Iowas.

The lands of the Iowa Tribe of Indians were allotted under the provisions of an act to ratify and confirm agreements with the Sac and Fox Nation of Indians and the Iowa Tribe of Indians of Oklahoma Territory and to make appropriations for carrying out the same, approved February 13, 1891. (27 Stat. 753; 1 Kapp. 393.)

Article 2 of this agreement provides for the cession to the United States of the lands reserved for the tribe with the provision that each and every member of the said Iowa Tribe of Indians shall be entitled to select and locate upon such reservation or tract of country, eighty acres of land which shall be allotted to such Indian in severalty. The manner of allotment is substantially that provided for under the General Allotment Act. The provision for the issuance of patents, and imposing restrictions upon alienation and taxation, constitutes Article 4 of said treaty and is as follows:

“Upon the approval of the allotments provided for herein by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his or her decease, of his or her heirs or devisees according to the laws of the State or Territory, where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs or devisees as aforesaid in fee, discharged of said trust and free of all incumbrance whatsoever.

“And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touching the same, before the expiration of the time above mentioned such conveyance or contract shall be absolutely null and void.

“And during said period of twenty-five years said lands, so allotted and the improvements thereon shall not

be subject to taxation for any purpose by any State or Territory or any municipal subdivision thereof nor subject to be seized upon any execution or other mesne or final process issued out of any court of any State or Territory and shall never be subject to be seized or sold upon any execution or other mesne or final process issued out of any court of any State or Territory upon any judgment rendered upon any debt of liability incurred, the consideration of which, immediate or remote passed prior to the expiration of said period of twenty-five years. And the law of descent and partition in force in the State or Territory where such lands are situated shall apply thereto."

This provision is substantially the same as that in the General Allotment Act. It, however, tacitly recognizes the right to dispose of the allotment by will, as it contains a provision that the conveyance at the end of the trust period is to be made to the allottee, or in case of his or her decease, of (to) his or her heirs or devisees, according to the laws of the State or Territory where such land is located. This is apparently a direct recognition of the right to dispose of the allotment by will. This provision is also a recognition that the laws of descent and distribution of the State in which the land is located control the descent of allotted lands. The provision imposing restrictions upon alienation is in language almost identical with that of the General Allotment Act and decisions construing that act are applicable.

By the terms of a supplemental article, the following additional provision is made:

"It is now further agreed by the Commission, on the part of the United States, at the special instance and request of Chief Tohee, that if the Iowas at the expiration of said term of twenty-five years, during which the United States shall hold the allotments in trust for them shall represent to the President that they desire said trust continued, then the President may, in his discretion, extend said period during which said lands are so held in trust for any period not exceeding five years."

There seems to have been no further legislation enacted with special reference to the Iowa Indians in anywise controlling or affecting alienation of the lands of the allottees of such tribe.

The Iowas are subject to the general legislation discussed in Chapter 31, entitled "Tribal Title and Citizenship, Chapter 32, entitled "General Allotment Act" and Chapter 33, entitled "Amendments to Allotment Act."

Section 180. Sac and Fox.

The lands occupied by the Sac and Fox Nation of Indians in the Territory of Oklahoma were allotted under the provisions of an agreement approved by Congress on the 13th day of February, 1891, (26 Stat. 749; 1 Kapp., L. and T., 389).

By the terms of this agreement the Sac and Fox Nation ceded and relinquished to the United States all of its title, claim and interest of every kind and character in and to the reservation with the stipulation that each and every citizen of such tribe over the age of eighteen years should have the right to select in allotment one quarter section of land in a body anywhere within the tract of country described, excepting Sections 16 and 36. Provision was also made for the selection in allotment of like amounts of land for minor children by their natural guardian, or in case a minor should be without a natural guardian, the Indian agent was authorized to make such selection.

Article 3 of this agreement, provided for the issuance of patent and imposing restrictions upon alienation as follows:

"It is further agreed that when the allotments to the citizens of the Sac and Fox Nation are made, the Secretary of the Interior shall cause patents to issue therefor in the name of the allottees which patent shall be of the legal effect and declare that eighty (80) acres of land to be designated and described by the allottee, his or her agent as above provided, at the time the allotment is being made, shall be held in trust by the United States of America, for the period of twenty-five years, for the sole use and benefit of the allottee, or his or her heirs, according to the laws of the State or Territory where the land is located; and that the other eighty (80) acres shall be so held in trust by the United States of America for the period of five (5) years, or if the President of the United States will consent, for fifteen (15) years for like use and benefit; and that at the expiration of the said periods respectively the United States will convey the same by patent to said allottee, or his or her heirs as aforesaid, in fee, discharged of said trust and free from all

incumbrances: *Provided*, That in no case shall a patent in fee be issued to a person who is an orphan at time allotment is made and unmarried, until he or she shall have arrived at the age of twenty-one (21) years or shall marry. In order that the question of the age of any orphan allottees aforesaid shall not be subject to future inquiry, it is agreed that the age of each orphan allottee, under the age of twenty-one (21) years shall be fixed and ascertained by the person making the allotment and reported by him to the Department of the Interior and such report of the age of any allottee shall be held and deemed conclusive in carrying out this agreement."

The provision with reference to the eighty acres to be selected as a homestead is in substantially the same terms as the provisions of the General Allotment Act. The eighty acres in excess of a homestead is to be held by the United States in trust for the period of five years, or if the President of the United States will consent, for fifteen years, and to be likewise conveyed at the expiration of such period. A patent in fee is not to issue in any instance to "a person who is an orphan at time of allotment and is unmarried until he or she shall have arrived at the age of twenty-one years or shall marry." The allotting agent is required, by the terms of the agreement, in preparing the roll of the members to ascertain and make a record of the age of each allottee. This record is made conclusive as to when the member of the tribe arrives at majority.

The law of descent and partition of the State or Territory in which the allotted lands are located is impliedly made applicable by the provision that the United States shall hold the lands allotted for the sole use and benefit of the allottee and his heirs according to the laws of the State or Territory where the land is located. The law of descent applicable under this provision is Mansfield's Digest of the Statutes of Arkansas of 1884, Chap. 49, from May 2, 1890, to November 16, 1907, and subsequent thereto the Oklahoma Statutes. This agreement differs very materially from that made with any other tribe of Indians, in that it contains no provisions of any character imposing restrictions upon alienation, unless the trust provision shall be so construed.

The General Allotment Act contained the same trust provision but Congress apparently in recognition of the right that the trust provisions did not operate as a restriction upon aliena-

tion or for the purpose of making restrictions cumulative specifically restricted alienation or encumbrance by the allottee during the trust period. We have nothing, however, in this provision to aid in its construction. It is simply a declaration of trust and an agreement to convey free from encumbrance to the allottee or his heirs at the expiration of the trust period. While there is but little in this agreement to assist in arriving at the meaning of this provision, the well-known policy of Congress to offer some protection to the Indian Allottee renders it highly improbable that Congress intended to permit the allottees of this tribe to alienate their lands immediately upon the issuance of the preliminary patent. If it had intended to authorize them to do so, provision would have perhaps been made for the issuance of a fee simple patent at once. But can the intent of Congress be gathered from other legislation of a similar character? Does not the fact that other Acts of a similar character contain definite provisions imposing restrictions upon alienation rather indicate that Congress was aware of the necessity of such provisions and purposely omitted the same from this Act?

CHAPTER XLI.

QUAPAWS, CONFEDERATED PEORIAS, WICHITAS AND AFFILIATED TRIBES.

Section 181. Quapaws.

Allotments to members of the Quapaw Tribe of Indians seem to have been made by the National Council of the Tribe, and not by a representative of the Department of the Interior. All allotments so made, however, were ratified and confirmed by the provisions of the Legislative, Executive and Judicial Appropriation Bill, approved March 2, 1895. (28 Stat. 907; 1 Kapp. 566.)

The provisions confirming these allotments and imposing restrictions upon alienation are as follows:

“That the allotments of land made to the Quapaw Indians, in the Indian Territory, in pursuance of an act of the Quapaw National Council, approved March twenty-third, eighteen hundred and ninety-three, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: *Provided*, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said Act of the Quapaw National Council subject to revision, correction, and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: *Provided*, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents: And *Provided* further, That the surplus lands on said reservation, if any, may be allotted from time to time, by said tribe to its members, under the above-entitled act.”

That part of this provision imposing restrictions upon alienation was the subject of extensive consideration by the Circuit Court of Appeals for the Eighth Circuit; in *Goodrum v. Buffalo* (162 Fed. 817), and it was there held under the provisions of this agreement and the patents issued pursuant thereto which patents contained the following provisions:

“Does give and grant unto the said (patentee) and to (his or her) heirs, the said tract above described, but with the stipulation and limitation, contained in the aforesaid

act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof, to have and to hold the same, together with all the rights, privileges and immunities and appurtenances of whatsoever nature thereunto belonging, unto the said (patentee) and to (his or her) heirs, forever, provided, as aforesaid, that the said tract shall be inalienable for the paid period of twenty-five years,"

that the disability of the allottee to convey runs with the land, and disqualifies the heir as well as the immediate allottee to convey within the prescribed period. It was further held that the government had a right to attach any condition or qualification it saw fit, to grants of the reservation lands of the tribe in severalty.

This is a very interesting and instructive case. The interpretation by this court of the statute imposing restrictions upon alienation undoubtedly gives the very fullest force and effect to such restrictions. The court was apparently impatient with what it undoubtedly regarded as an effort to invoke the jurisdiction of the court to avoid the effect of the provisions of the statute imposing restrictions upon alienation.

The Quapaws are located in that part of the State of Oklahoma that was formerly a part of the Indian Territory. While it is believed that the Quapaw Allottee became a citizen of the United States upon the selection of his allotment, he undoubtedly became so by the act of March 3, 1901, making every Indian in the Indian Territory a citizen of the United States.

The laws of descent of the State of Kansas applied to the members of the Quapaw Tribe until the 21st day of April, 1904, when the laws of Descent and Distribution of the State of Arkansas were extended to all persons and estates in the Indian Territory whether Indian, Freedmen or otherwise. (*Finley v. Abner*, 129 Fed. 734, 69 S. W. 911.)

The Arkansas Statute of descent continued to control the estates of the allottees of the Quapaw tribe until the admission of Oklahoma to Statehood when the Statutes of Oklahoma were substituted for those of Arkansas.

Section 182. Wea, Peoria, Kaskaskia, Piankeshaw and Western Miami Indians.

By an Act of Congress approved March 2, 1889, entitled "An Act to Provide for an Allotment of land in severalty, in-

cluding the Peoria and Miami in the Indian Territory, and for other purposes" (25th Stat. 1013), the provisions of the General Allotment Act of 1887 (25 Stats. 1013; 1 Kappler, p. 344) are extended "to and are made applicable to the confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribes of Indians and the Western Miami Tribe of Indians now located in the Northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if such tribes had not been excepted from the provisions of said act, except as to Section 6 of said Act and as otherwise hereinafter provided." These Tribes were excepted from the General Allotment Act at the time of its passage, by Section 8 thereof. Section 6 thereof, which is not extended to the allottees of the confederated Tribes is that conferring citizenship upon allottees. Machinery is provided for the allotment of lands in severalty, with the reservation of certain lands for school, church and cemetery purposes, and out of the remainder there is to be allotted lands not exceeding one hundred and twenty acres to each and every person entitled thereto by reason of being a member of said tribe by birth or adoption.

It is provided that "the lands so allotted shall not be subject to alienation for twenty-five years from the date of issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void." After the completion of allotment, each allottee may lease or rent his individual allotment for a period not exceeding three years. The lands of a minor may be leased by the father, if he be living, and if not, by the mother. If both be dead, the chief is constituted the natural guardian of the minor for the purpose of leasing or renting his land.

It was further agreed that at the expiration of twenty-five years, the remaining unallotted lands should be divided equally among the members of the tribe.

Section 3 declares that any act of Congress theretofore passed in conflict with any of the provisions of said agreement, either as to land or money, is repealed.

The Indian Appropriation Bill of May 27, 1902, (32 Stat. 262; 1 Kapp. 752), contained the following provision; affecting these allottees:

“That so much of the Act approved March 2, 1889, entitled ‘An Act to provide for the allotment of lands in severalty to United Peorias and Miamies in the Indian Territory, and for other purposes,’ which inhibits the sale of their surplus lands for twenty-five years from the said date, be, and the same is hereby, repealed: . . .”

Under this provision the surplus lands of the allottees of the property affected thereby became immediately alienable. There does not seem to have been other special legislation with reference to the allottees of these tribes. The lands of these tribes having been allotted under the General Allotment Act, what is said in Chapter 32, entitled “General Allotment Act” and Chapter 33, entitled “Amendment to General Allotment Act” is applicable to the Wea, Peoria, Kaskaskia, Piankeshaw and Western Miami tribes of Indians. The allottees of these tribes are also subject to the general legislation relating to allottees of Indian tribes, whether applicable to allotted or inherited lands.

On March 3, 1909 (35 Stat. 751) the President approved an Act authorizing the Secretary of the Interior to remove the restrictions upon the alienation of any adult member of any of the Indian tribes belonging to the Quapaw Agency, upon such terms as he deemed for the best interests of the applicant, of all of his allotted lands, except forty acres reserved for a homestead. The Secretary is also authorized in legislation to make sale of the entire allotments of the Modocs for the purpose of removal to the Klamath Agency, Oregon.

Section 183. Wichita and Affiliated Bands.

The Indian Appropriation Act, approved March 2, 1895 (28 Stat. 895; 1 Kapp., Laws and Treat., 560), contained an agreement made and entered into by and between the United States and the Wichita and affiliated bands of Indians for the allotment of the Wichita Reservation. There is located upon the

Wichita Reservation and affiliated with the Wichita tribe a few scattering members from the various tribes of Indians located in Oklahoma and elsewhere. The affiliated members of the tribe, however, received their allotments pursuant to an agreement with the Wichitas and not pursuant to the agreement with the tribes to which they originally belonged and from which they had become separated.

Article 2 of the Agreement provides for the allotment to each and every member of the Wichita and affiliated bands, native or adopted, one hundred and sixty acres of land; one-half of which shall be of the class designated as "grazing" and one-half of that class designated as "corn growing land." Provision is then made for the selection of allotments by adult allottees and for and on behalf of minor allottees.

Article 4 of the Agreement fixes the character of title passing to the allottee, the restrictions imposed upon alienation and it is as follows:

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for a period of twenty-five years (25), in the manner and to the extent provided for in the Act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.' Approved February 8, 1887. And at the expiration of twenty-five (25) years the title thereto shall be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances."

The result of this provision is to place the allottee of the Wichita and Affiliated bands under the provision of the General Allotment Act of 1887 as fully as if the allotment had taken place under that agreement and without reference to any other treaty or agreement.

CHAPTER XLII.

SALES OF LANDS OF MINORS.

Section 184. Federal legislation.

By the extension of the statutes of the Territory of Oklahoma over the State of Oklahoma the lands of minor Indians became subject to sale and disposition thereunder except as prohibited or limited by existing Federal legislation. Wherever restrictions upon alienation exist, the lands are not subject to sale by the county courts. Where all restrictions upon alienation have been removed or have expired by reason of the expiration of the time limit for which they were to continue, or have ceased to exist for any other reason, the lands of Indian minors become subject to sale and disposition through the county courts, in the exercise of their probate jurisdiction. Under the provisions of Section 22 of the act of April 26, 1906 (section 591), the minor heirs of an allottee were permitted to join in the sale of inherited lands by guardian duly appointed by the proper United States Court in the Indian Territory. The same section contained a provision that in case of the organization of a State or Territory, then by the probate court of the county in which said minor or minors may reside or in which said real estate is situated upon an order of such court made upon petition filed by guardian. All conveyances under this provision by heirs who are full-blood Indians were to be subject to the approval of the Secretary of the Interior under such rules and regulations as he might prescribe.

Upon the admission of the State of Oklahoma into the Union the laws of the Territory of Oklahoma were extended to and became applicable to the persons and property of Indians as well as other citizens and residents of the State of Oklahoma. Therefore, the lands of minor Indians were from November 16, 1907, until May 27, 1908, could be sold upon the order of the county courts of the State of Oklahoma, subject to such positive provisions of the federal statutes as were then in force imposing limitations upon the right to sell and requiring the approval of such sales by the Secretary of the Interior. The lands of allottees of other than the five civilized tribes that were not es-

pecially excepted therefrom, were subject to sale under the provisions of Section 7 of the act of May 27, 1902 (32 Stat. 275). Section 7 of said act will be found in Section 793 hereof and discussion of the same in Sections 33a and 160.

The act of May 27, 1908 (Chap. 63), contained the following provisions with reference to the jurisdiction of the courts of the State of Oklahoma over the sale and disposition of the lands of minors and incompetent Indians, (section 2):

“ . . . And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.”

Section 3 of said Act is in part as follows:

“That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.”

Section 6 contains the following provision:

“That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma.”

Section six contains a further provision authorizing the Secretary of the Interior to investigate and make reports upon sales actual or proposed of the lands of minor Indians, and that, “no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, order of the court, or otherwise.”

The provision that the persons and property of the minor allottees of the five civilized tribes except as otherwise specifically provided by law shall be subject to the jurisdiction of the probate courts of the State of Oklahoma, is a very broad and comprehensive provision. There is no provision of any federal statute remaining in force vesting jurisdiction over the persons or estates of minor Indians located within the State of Oklahoma, in any court or tribunal other than that of the

county courts and county judges of the various counties of the State of Oklahoma. It is true that in certain cases the approval of conveyances made through the probate court must be had by the Secretary of the Interior before such conveyances become effective. This is true, however, only as to those cases in which there are positive statutory provisions requiring such approval.

Section 185. Probate Jurisdiction.

Jurisdiction over the estate of decedents and minors is usually termed "probate jurisdiction." In the State of Oklahoma probate jurisdiction is vested in the county courts and judges thereof. Section 12 of Article 7 of the Constitution provides that "The county court co-extensive with the county, shall have original jurisdiction in all probate matters," but may not decree the sale of the real estate not arising under the probate jurisdiction. (Bunn's Edition, Sec. 182.)

Section 13 of Article 7 of the Constitution contains the following provisions:

"SEC. 13. The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians or minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estate of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof." (Bunn's Edition, Sec. 185.)

Under the Constitution county courts are, as to the enforcement of criminal statutes, and as to civil litigated matters, courts of limited jurisdiction; they are as to probate matters courts of general jurisdiction, standing substantially in the same position, to probate jurisdiction as the district court to civil and criminal jurisdiction. Perhaps as to probate matters, county courts are courts of general jurisdiction in a broader sense than are the district courts of general jurisdiction. Like the district courts they are constitutional courts and courts of record, unlike the district courts in that no part of the probate jurisdiction is conferred upon any other judicial tribunal, and while the Legislature reserved the right to modify the ju-

risdiction of both courts in civil and criminal matters, generally that right does not seem of have been reserved with reference to probate jurisdiction.

It may be said that under the constitutional provisions the county courts of the State of Oklahoma are in the exercise of their probate jurisdiction courts of general jurisdiction in the most liberal sense. Much of the uncertainty as to the conclusive effect of the proceedings and judgments of probate courts, or courts exercising probate jurisdiction, has arisen because of the fact that such courts were originally of very limited jurisdiction, even as to the estates of minors, incompetents and decedents committed to their care. Judicial expression and judicial dictum have hardly kept pace with legislation broadening the jurisdiction and authority of courts exercising probate jurisdiction. The tendency has been to cite and follow the earlier cases, where such courts were acting under statutes conferring very limited jurisdiction, rather than to take proper cognizance of the enlarged jurisdiction of such courts. This distinction is most vital perhaps in dealing with the action of probate courts when collaterally assailed. There has been a disposition in some jurisdictions, sometimes warranted by the limited authority conferred and other times not, to materially limit the conclusive effect of probate proceedings, by the assumption that in courts of such limited jurisdiction the record must furnish complete evidence of a compliance with every statutory provision, before the judgments of such courts will be recognized as *res adjudicata*. If such a rule is justified by the statutory limitations upon probate jurisdiction in other States, it is not the case with reference to county courts of this State. The same presumption of good faith and the rightful exercise of jurisdiction should be given the proceedings, orders and judgments of the county courts in the exercise of the probate jurisdiction as is given to the judgments and decrees of the district courts.

While the laws of the State of Oklahoma do not confer authority upon its county courts in the exercise of their probate jurisdiction or otherwise to approve the sales made by adult full-blood allottees of their inherited lands and the Congress of the United States is without jurisdiction to confer judicial authority upon such county courts yet there is no reason why Congress may not designate the county court as the proper

authority to approve the sale by a full-blood allottee just as it would designate the Indian Agent, the Secretary of the Interior or any other individual, whether holding an official position under the Government of the United States or not.

Section 186. Appointment of guardians.

Section 1814 of Wilson's Statutes of Oklahoma, 1903, is as follows:

"The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county, or who reside without the Territory and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor."

The jurisdictional pre-requisites are that the minor must be without a guardian, that he must be a resident of the county, or own property therein and be a non-resident of the State, that such appointment be made upon petition, and the judge before making the same must cause reasonable notice to be given to the relatives of the minor residing in the county and to any person having the care of such minor. The character and length of the notice is left to the discretion of the judge, but notice of some character must be given to the relatives of the minor residing in the county and to any person having the care of such minor whether a relative or not. The provisions of the statute requiring notice are mandatory and in so far as the rights of the parent to the custody of the child are involved are jurisdictional. (*Wortham v. John*, 98 Pac. 347.)

If the minor be under the age of fourteen years the probate judge may appoint his guardian. If he be over the age of fourteen years, he may nominate his own guardian, and if such nomination is approved by the judge the appointment must be made accordingly. (W. S., sec. 1815.) This statute, however, does not mean that the probate judge may without notice to or in disregard of the wishes of the parent or natural guardian nominate and appoint such person as he may see fit.

Care should be exercised to see that the jurisdiction of the court in the appointment of a guardian is properly invoked. If the appointment is made wholly without jurisdiction all proceedings resting thereon including the sale of the lands of the minor are void.

Section 187. Bond of guardian.

Section 1821 of Wilson's Statutes of Oklahoma contains the following provision:

"Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law."

And then follows a requirement that certain conditions shall form and constitute a part of every guardian's bond.

The filing of the bond would as a first impression appear to be jurisdictional under the provisions of the statute. This provision however is taken literally from the North Dakota Code which was likewise taken from the California Code and the Supreme Court of that State has held that the failure to give such bond does not invalidate the guardianship proceedings. The Supreme Court of California in *In re Chin Mee Ho*, 73 Pac. 1004, disposes of the failure to give bond in a short paragraph which is as follows:

"The failure to require a bond on the appointment of a guardian does not invalidate the guardianship proceedings, as it is merely an error, and not an excess of jurisdiction."

The provision in the Oklahoma Code being borrowed literally from the California Code by way of North Dakota, the construction of that provision even after it became a law in Oklahoma is entitled to much consideration. However, in the earlier case of *Murphy v. Superior Court, Santa Clara County*, 24 Pac. 311, the Supreme Court of California makes the following declaration in reference to the subject:

". . . . The provision that a bond must be given applies to testamentary guardians, but a guardian appointed by deed must be held to be a testamentary guardian, as such appointment can not take effect until the death of the par-

ent. As no bond was given by him he was not legally appointed by deed, and his contention, based on such pretended appointment, cannot be maintained."

Before proceeding with the sale upon petition of a guardian it should be ascertained that the bond required by the statute has been given and approved and the oath executed and filed.

It is provided in Section 1851 of Wilson's Statutes that every guardian authorized to sell real estate must before selling same give bond to the probate judge with sufficient sureties to be approved by such judge conditioned that he will sell the same as ordered and account for the proceeds of the sale. While the failure to give bond, would perhaps not invalidate the sale to a purchaser in good faith without notice of such defect in the proceedings, it is advisable that every statutory provision relating to the sale of lands of minors should be complied with. (*Smith et al. v. Biscailuz et al.*, 21 Pac. 15.)

Section 188. Partition of real estate.

Section 1835 of Wilson's Statutes of 1903 provides:

"The guardian may join in and assent to a partition of the real estate of a ward whenever such assent may be given by any person."

This provision undoubtedly authorizes the guardian to assent to the partition of real estate for the minor in any case where an adult under like circumstances would be capable of assenting. This provision of the Oklahoma statute differs materially from that of California and other States. The statutes of the other States usually require the guardian to secure the approval by the court in which the proceeding is pending of his assent to the partition, or in some form to secure the approval of the court appointing him guardian. This provision seems to eliminate the control of the court making the appointment or the discretion of the court ordering the partition and substitutes in lieu thereof the judgment and discretion of the guardian. (*Richardson v. Loupe*, 22 Pac. 227; *San Fernando v. Porter*, 58 Cal. 81; *Kromer v. Friday*, 39 Pac. 229; 32 L. R. A. 671.)

Section 189. When sale is authorized.

The sale of the real estate of a minor is authorized when his personal estate and income from his real estate are insufficient to pay his debts (Wilson's Stat., Sec. 1831); when the

income and profits of the estate are insufficient for the comfortable and suitable maintenance and support of the ward and his family, if there be a family, (Wilson's Stat., Sections 1833 and 1840), or where it appears to the satisfaction of the court that it would be for the benefit of the ward to sell his real estate or some part thereof and put the proceeds out at interest or invest the same in productive stocks or improvements upon other real estate of the ward (Wilson's Stat., Sec. 1841). In each instance the sale must be upon order of the county court. The sections above referred to authorizing the sale of the real estate of a minor are set out in the margin.

The use of the word "sufficient" in the second line of Section 1840 is clearly an error. Where the word "sufficient" appears in said line it should read "insufficient." Section 1840 was adopted from the North Dakota Code by the Legislature of Oklahoma in 1890 in the rush of the closing hours of a legislative session. The North Dakota Code contained the same error. It was adopted from the California Code and the error arose in transplanting this statute from the California to the North Dakota code. In the California code the word "insufficient" appears where the word "sufficient" appears in the Oklahoma code; and although this error appears in

¹ SECTION 1831. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided by law for the sale of real estate of decedents.

SECTION 1833. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the probate court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

SECTION 1840. When the income of an estate under guardianship is sufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

SECTION 1841. When it appears to the satisfaction of the court upon the petition of the guardian, that for the benefit of his ward his real estate or some part thereof, should be sold, and the proceeds thereof, put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

the compiled laws of North Dakota for 1887, the code from which the provision was adopted for Oklahoma, the error was corrected in the next revision of that code. Text-book writers who have considered the various codes have failed to discover and make a note of this error as it appears in the Oklahoma and formerly in the North Dakota code. If a literal construction be given to Section 1840, no case could arise in which the sale of the lands of a minor would not be authorized.

Section 190. Necessary steps in proceedings to sell.

To avoid overlooking a compliance with any of the statutory provisions authorizing or regulating the sale of the real estate of a minor by order of a county court, it perhaps is advisable to enumerate the various steps required to be taken in the order fixed in the statute. The following action should be taken and the following proceedings had:

1. There should be filed a petition for an order of sale.
2. A hearing should be had and an order procured, directing the next of kin of the minor and all persons interested in the land, to appear and show cause why the order should not be granted as prayed for.
3. There should be service of the order to show cause as required by the statute.
4. Proof of service of the notice of application for the order to sell should be made by affidavit, filed on or before the day on which the hearing is to be had.
5. There should be a full and complete hearing on the petition for the order to sell.
6. An order of sale should be entered, complying with the statutory provisions.
7. A special bond should be filed and approved in such sum as may be ordered by the court.
8. Notice of the sale of the real estate should be given as required by the statute.
9. Proof of the giving of the notices as required by the statute to be filed with the return on the sale.
10. The sale should be made at the time and place prescribed in the order and of which notice is given, and if there is a postponement of the sale notice of such postponement should be given as required by statute.
11. A return should be made of the sale on or before the

first day of the next term of the court, succeeding the day on which the sale is made.

12. Hearing should be had upon such return and if such hearing is on the first day of the succeeding term, no notice is necessary.

13. If the hearing upon the return be not had upon the first day of the next succeeding term, an order should be entered fixing the date of such hearing and requiring notice to be given thereof.

14. Notice should be given as required by the statute of the hearing on the return.

15. Proof of service of the notice should be procured and filed prior to the day of the hearing.

16. An order of confirmation should be duly entered and the court should find in said order, a compliance with all of the statutory provisions authorizing the sale of the real estate of a minor, and regulating the proceedings thereon.

17. The order of confirmation should be recorded as required by the statute.

18. A deed should be executed by the guardian, conveying the interest, of the minor to the purchaser at the sale.

If a private sale is desired, the following additional statutory provisions must be complied with:

1. The petition must pray an order authorizing a private sale.

2. The order must authorize a private sale.

3. There must be an appraisalment of the real estate ordered sold.

4. Notice must be given of the sale as required by statute.

5. There must be proof of service of the notice as required by the statute, before the sale is presented for confirmation.

6. Confirmation cannot be had unless ninety per cent of the appraised value is realized.

Section 191. Petition for sale.

The necessary averments of a petition for the sale of real estate of a minor are usually fixed by statute. There is a very substantial difference in the statutory requirements in the various jurisdictions. In Oklahoma and States having similar

statutes the jurisdiction of the court is invoked by filing a proper petition in the court in which the guardianship is pending. Section 1844 of Wilson's Statutes of 1903 contains the only provision in force in the State of Oklahoma prescribing the requisites of a petition to sell the real estate of a minor. Under this statute, the petition should contain an accurate description of the land, one or more of the statutory grounds authorizing or permitting the sale and such a showing as to the condition of the estate as to render it necessary or advisable that the court make the order. The petition should also disclose the name of the next of kin and of all persons interested in the estate and if a private sale is desired, the reasons therefor, and a prayer that the same be so ordered.

A proceeding to sell the real estate of a minor under the Oklahoma statute is in no sense adverse to the minor. It is a proceeding by the minor through his guardian, prosecuted for his benefit. This being true, and the jurisdiction of the court being once properly invoked by the filing of a petition containing the necessary averments subsequent irregularities do not destroy the jurisdiction thus vested, or affect the validity of a duly confirmed sale.

A petition for an order to sell the real estate of a minor to pay debts may at first appearance seem to be a proceeding adverse to the minor; but in as much as it is a voluntary one prosecuted by the ward upon the motion of his guardian, there is but little reason for insisting that it is an adverse or involuntary proceeding. The averments in the petition should be liberally construed for the protection of a bona fide purchaser at such sale. Technical defects in the petition should not avail to defeat the title thus acquired.

The next of kin having no property interest in the real estate of a minor, the notice is required to be served upon such next of kin in order that those who may be interested in the minor's welfare may have an opportunity to protest if the sale is not for his benefit, and the failure to notify the next of kin, while an irregularity, could not affect the jurisdiction of the court and should not in any sense affect the validity of the sale under an order otherwise regularly obtained.¹ (*Duncan v.*

¹ SECTION 1844. To obtain an order for such sale, the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the

Crook, 49 Mo. 116; *Beezley v. Phillips*, 117 Fed. 105; *Mulford v. Stolzenback*, 46 Ill. 303; *Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; *Fitch v. Miller*, 20 Cal. 352; *Scarf v. Aldrich*, 32 Pac. 324; *Walker v. Goldsmith*, 12 Pac. 537; *Ryder v. Flanders*, 30 Mich. 336-341; *Weems v. Masterson*, 80 Tex. 45; *Schafer v. Leake*, 51 Wis. 487; *Roberts v. Johnson*, 57 Tex. 62; *Wimberly v. Wimberly*, 38 Ala. 40; *Wamble v. Trice*, 66 S. W. 370, 67 S. W. 7; *Lynch v. Kirby*, 36 Mich. 238; *McKeever v. Ball*, 71 Ind. 398; *Howbert v. Heyle*, 27 Pac. 116; *Fowlers v. Lewis*, 14 S. E. 447; 21 Cyc., 126-7.)

Section 192. Hearing and order to show cause.

The provisions of the statute controlling the hearing upon the application for an order of sale of the real estate of a minor and the order made pursuant thereto are found in Section 1845 of Wilson's Statutes of Oklahoma. Under the provisions of this section, if it appears to the court or judge from an examination of the petition that it is necessary or would be beneficial to the ward that his real estate or some part thereof should be sold, such court or judge must make an order directing the "next of kin of the ward and all persons interested in the estate" to appear at a time and place to be specified in the order "not less than four nor more than eight weeks from the time of making such order," to show cause why an order should not be made and entered, directing the sale of such real estate.

The statute evidently does not contemplate that further investigation should be made at this time as to the necessity of or benefits to be derived therefrom than to examine the petition.¹

condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

¹ SECTION 1845. If it appear to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

Section 193. Service of notice of hearing.

Under Section 1846 of Wilson's Statutes a copy of the order to show cause entered by the court or judge upon the hearing of the petition to sell the real estate of a minor must be personally served on the next of kin of the ward and on all persons interested in the estate, at least fourteen days before the hearing of the petition, *or* must be published at *least three successive weeks* in a newspaper printed in the county; or, if there be none printed in the county, then in such newspaper as is specified in the order. The consent in writing of all persons interested in the real estate and the next of kin is a waiver of the necessity of service of any character and the order may be made upon such waiver without service of notice either personally¹ or by publication. It will be observed that the notice is required to be served upon the "next of kin of the ward" and "all persons interested in the estate." The time fixed in the notice must not be "less than four nor more than eight weeks from the making of the order." The notice may be served either personally *or* by publication. If service is personal it must be completed not less than fourteen days before the hearing, and if by publication it must be published "at least three successive weeks" before the hearing.

Just how far the notice required to be given is jurisdictional, has been a source of no little controversy. The cases, with very few exceptions, hold that the jurisdiction of the court is invoked by filing a petition containing the proper averments and that such a proceeding is one by and not against the minor and that it is not adverse in so far as the next of kin are concerned. Even if the proceedings are adverse to the next of kin, they having no property interest in the estate of the minor, a failure to give notice as to them should not be held to affect the jurisdiction of the court. The proceeding being instituted and prosecuted by the minor, through his guardian, he should not be permitted to deny the jurisdiction of the court

¹ SECTION 1846. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served personally or by publication.

because of defects in proceedings which are essentially his own.

If any person not served with process should in fact at the time of the making of the order be the owner of an interest in such real estate, either in possession or in reversion, such order would be ineffectual as against him. There are a very limited number of decisions which treat a proceeding to sell the real estate of a minor as an adversary proceeding. They are based, however, upon statutes differing very materially from the Oklahoma Statute. All the cases construing statutes in the same language, or language similar to that of the Oklahoma Statutes have held the proceedings not to be adverse to the minor. A careful examination of the cases and of the reasons urged for each of the views inevitably leads to the conclusion that the decisions asserting the doctrine that proceedings to sell the real estate of a minor by his guardian are not adverse proceedings, are better founded in reason and supported by authority than are those taking the opposite view of the question. (*Mohr v. Porter*, 51 Wis. 457, 8 Mo. 364; *Mohr v. Manierre*, 101 U. S. 417; *Wright v. Edwards*, 10 Ore. 298; *Gage v. Henry*, 5 Sawyer, 237;; *Scharf v. Aldrich*, 32 Pac. 324; *Bradford v. Larkin*, 45 Pac. 69; *Mortgage Trust Co. v. Redd*, 88 Pac. 476; *Hagerman v. Meeks*, 86 Pac. 801; *Hughes v. Goodale*, 66 Pac. 702; *Beachy v. Shomber*, 84 Pac. 547; *Howbert v. Heyle*, 27 Pac. 116; *Orman v. Bowles*, 33 Pac. 109-112; *Calvert v. Calvert*, 24 Pac. 1043; *The Estate of Hamilton*, 52 Pac. 708; Church, Probate Law, Vol. 1, p. 183; *Trutch v. Bunnell*, 5 Ore. 504; *Conklin v. LaDow*, 54 Pac. 218; *Hill v. Wall*, 4 Pac., 1139; *Smith v. Biscailuz*, 21 Pac. 315, 23 Pac. 314; *Walker v. Goldsmith*, 12 Pac. 553; *Comstock v. Crawford*, 3 Wall. 396, 165 Fed. 616.)

Section 194. Provisions relating to sale of real estate of decedent to control.

The Oklahoma Statutes provide a definite and independent procedure for the sale of the real estate of minors up to and including the order of sale. Thereafter the proceedings are to be controlled by those provisions of the statute relating to the sale of the real estate of deceased persons by the county Courts in the exercise of their probate jurisdiction. The provision making such procedure applicable is found in Section 1852 of Wil-

son's Statutes.¹ The language of this Statute is sufficiently broad to require the giving of the notice of the application for sale in accordance therewith, but inasmuch as the Statute specifically prescribes in another Section (1850) the terms of an order for the sale of the real estate of a minor ward, making specific provision for the character and length of notice to be given, the use of the words in Section 1852, "giving notice and the hearing of such petition" should be construed as having reference to the notice of sale only and proceedings subsequent thereto and not to the notice required to be given upon an application for an order of sale.

Section 195. Order of sale.

Section 1850 of Wilson's Statutes of 1903,² provides what the order directing the sale of the real estate of a minor shall contain, and Section 1660 of the same Statute³ dealing with the estates of decedents, prescribes what the order directing the sale of the real estate of decedents shall contain.

While perhaps it is sufficient that the order of sale for the real estate of a minor comply with Section 1850, yet, inasmuch as the provisions of Section 1660, directing what the terms of the order shall be where there is to be a private sale, are not in conflict with any part of Section 1850, it is advis-

¹ SECTION 1852. All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts must be had and made as provided and required by the provisions of law concerning the estates of decedents unless otherwise specifically provided in this chapter.

² SECTION 1850. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

³ SECTION 1660. . . . Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold either at public or private sale, as the executor or administrator shall judge to be most beneficial to the estate. . . .

able (where the sale is to be private) that the order should comply with the provisions of Section 1660. To make the provisions of Section 1660 applicable to the sales of the real estate of minors, the words "as the executor or administrator shall judge to be most beneficial to the estate" must be transposed so as to read, "as the guardian shall judge to be most beneficial to the estate." There can be no objection to including in the order, a distinct provision directing whether the sale shall be public or private. The guardian may be, and frequently is, at a loss as to the method of procedure in the absence of instructions from the court ordering the sale. Wherever it is within the jurisdiction of the court to prescribe in detail the manner of the execution of the order of sale it is perhaps advisable to do so, as it relieves the guardian of the responsibility of having to act upon his own judgment in matters involving intricate legal questions. The order should also direct whether the sale is to be public or private, and whether for cash or on credit. It should contain an accurate description of the property ordered sold. While an error in the description of the property ordered sold may not destroy the validity of the sale, the possibility of future controversy arising from defects of this character has a tendency to deter bidders. A full compliance with all statutory provisions is desirable whether jurisdictional or not. The safeguards provided for the protection of minors should be observed.

The statute expressly provides that the order of sale must specify therein the causes or reasons why the sale is necessary or beneficial. This provision serves two purposes. It especially directs the court's attention to the necessity for a legal reason authorizing the sale, and furnishes an adjudication of the existence of a state of facts authorizing the sale under the provisions of the statute.

A guardian is required to execute an additional bond before selling the real estate of the minor, and it is well to include in the order of sale a provision directing the execution of the bond and fixing the amount thereof. And if a private sale is ordered it is perhaps desirable that the order should name the appraisers.

Section 196. Notice of sale.

Notice of a sale of the real estate of a minor which is to be made at public auction must be given by posting such notice

showing the time and place of the sale, in three of the most public places in the county in which the land is situate and by publishing the same for *three weeks successively next preceding the sale* in a newspaper printed in the same county; if there be no newspaper printed therein, then the notice must be published in such newspaper as the court may direct. The notice is required to give only the time and place of the sale and under the statute need not give the terms and conditions thereof unless required by order of the court. While the statute does not seem to require it, it is certainly advisable that the notice contain the terms of sale. These provisions are contained in Section 1662¹ of Wilson's Statutes.

It will be observed that the provision for publication of the notice of sale differs substantially from the provisions on an application for an order to sell. Upon an application for an order to sell, a personal notice of fourteen days is required *or notice must be published at least three successive weeks in newspaper printed in the county, etc.* The notice of the time and the place of the sale of the real estate of a minor must be posted in three of the *most* public places in the county in which the land is situated and published in a newspaper, if there be one printed in the same county in which the land is situated, but if none, then in such papers as the court may direct for *three weeks successively next* before the sale. The Statute contemplates a publication for three successive weeks next before the sale. What is the effect of the publication of a notice for the given time, but not for three weeks successively *next* before the sale? Or, what is the effect if the notice be published in three successively weekly issues of a newspaper, but the full three weeks have not expired from the date of the first publication, when the day of the sale arrives? A failure to substantially comply with the provisions of the Statute would perhaps be held to constitute reversible error on appeal from an order of confirmation, but would the failure to so comply render the sale invalid to such an extent that it could be assailed in any other

¹ SECTION 1662. When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

manner than by such appeal? While the authorities are not entirely uniform, it is believed that error or defect in publication of the character above suggested cannot be made the basis of collateral attack upon a conveyance made by a guardian under order of sale, where the same has been duly reported to and confirmed by the court. (*Mohr v. Manierre*, 101 U. S. 418; *Thaw v. Ritchie*, 136 U. S. 548; *Fitzgibbon v. Lake*, 29 Ill. 176; *Mulford v. Beneridge*, 78 Ill. 458; *Mohr v. Porter*, 51 Wis. 357, 8 N. W. 364; *Orman v. Boles*, 33 Pac. 110; *Kretsinger v. Brown*, 165 Fed. 612; *Walker v. Goldsmith*, 12 Pac. 555; *Hagerman v. Meeks*, 45 Pac. 69; *Conkling v. LaDow*, 54 Pac. 218; *In Re Hamilton Estate*, 52 Pac. 710; *Mortgage Trust Co. v. Redd*, 88 Pac. 476; *Temple v. Hammock*, 52 Miss. 360 (contra); *Estate of Dorsey*, 17 Pac. 209; *Schaale v. Wasey*, 38 N. W. 316; *Dexter v. Cranston*, 2 N. W. 674; *Scarf v. Aldrich*, 32 Pac. 324; *Gage v. Henry*, 5 Sawyer 243; *Fitch v. Miller*, 20 Cal. 381.)

Section 197. Time and place of sale.

Under the provisions of Section 1663 of Wilson's Statutes, where the sale is to be at public auction, it must be made in the county where the land is situated; but when the land is situate in two or more counties it may be sold in either. The sale must be made between nine o'clock in the morning and the setting of the sun of the same day and on the day named in the notices, unless postponed to a specific day. Section 1663 of Wilson's Statutes contains provisions regulating the time and place of sale and is as follows:

"Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed."

If at the time appointed for the sale the guardian deems it for the best interest of the persons concerned therein that the same be postponed, he may postpone it from time to time not to exceed in all three months. (W. S., Sec. 1672) In case of a postponement, notice thereof must be given by public declaration at the time and place first appointed for the sale and

if postponement be for more than one day, further notice must be given by posting in three or more public places in the County, where the land is situated, or publishing the same, or both, as the time and circumstances will admit. (Wilson's Statute, Sec. 1673.)

It is evidently the purpose of Section 1672 and 1673¹ to require the giving of adequate notice of the postponement of a guardian's sale. Subject to a compliance with the provisions contained in these two sections, the guardian may give such notice as under the circumstances will, in his judgment, keep the public best informed as to the time and place when the sale will take place. Apparently under the terms of Section 1663, the court may order the sale to be made either at the court house, upon the land or at such other place as will give opportunity for competition.

Section 198. Private sale.

Under the provisions of Sections 1664 and 1665 of Wilson's Statutes of 1903² the lands of a minor may be sold by

¹SECTION 1672. If at the time appointed for the sale, the executor or administrator deems it for the interest of the persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

SECTION 1673. In case of a postponement, notice thereof must be given, by public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

² SECTION 1664. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper if there be one printed in the same county, if none, then in such paper as the court may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the judge of the probate court to which the return of the sale must be made, at any time, after the first publication of notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice. In which case the notice of sale and the sale may be made to correspond with such order.

his guardian at private sale. In order to secure authority to sell at private sale, the petition for the order to sell should contain a prayer that such authority be given. Private sales are usually not ordered unless good reasons therefore exist, and are not confirmed unless the statutes have been fully complied with. The procedure necessary to secure the disposition of the real estate of a minor by private sale is materially different from that securing an order for public sale. Procedure in making the sale, and the return thereon also differ very materially from that where the sale is public.

The notice of such sale must be posted in three of the most public places in the county *and* published in a newspaper printed in the county, if there be any, and if none, then in such papers as the court may direct, for two weeks successively *next* before the day on or that after which the sale is to be made. The day on or after which the sale is to be made must be at least fifteen days from the first publication of the notice and the sale must not be made before such day, but must be made on said day or within six months thereafter.

The notice must also contain a correct description of the land; the bids must be in writing and may be left at a place designated, delivered to the guardian, or filed in the office of the judge. Such bids may be made at any time after the publication of the notice and before the making of the sale. The court or judge may, if the best interest of the minor will be subserved, shorten the time of the notice, but in no event to less than one week, and may direct a sale to be made not less than eight days from the first publication of the notice.

What is said in previous sections regarding the publication of the notice of an application to sell and of notice of sale, is applicable to the notice to be given under the provisions of this section.

The Supreme Court of California, it seems, has construed this provision where applicable to the sale of estates of dece-

SECTION 1665. No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

dents, and required a strict compliance with the provisions of the statute, evidently because such proceedings are regarded as adverse in their nature as to the heirs and other persons interested and they are therefore entitled to notice of all proceedings taken, looking to the sale or disposition of the lands of the decedent. It is necessary to bear this distinction in mind or the cases cited at the conclusion of this section may be misapprehended.

Under Section 1665 the real estate of a minor must be appraised before the sale thereof and the sale may not be confirmed unless the bid equals ninety per cent of the appraised value. The appraisement may be made at any time before the sale or the confirmation thereof. If the lands offered for sale have previously been appraised, but more than a year has expired since their appraisal, they are required to be re-appraised under the provisions of this section.

While the sale prescribed in Section 1664 is termed a private sale, it is not so in the ordinary sense of the word. It is in fact at auction to the highest bidder, the amount bid by each individual being kept concealed from other bidders until the final award. (*In Re Estate of Dorsey*, 17 Pac. 209; *Hellman v. Merz*, 44 Pac. 1079; *In Re O'Sullivan Estate*, 24 Pac. 281.)

Section 199. Proof of service of notice.

Notice is required to be served of the order to show cause why the real estate of a minor should not be sold; of the order of sale; of the application for the confirmation of the sale where not made on the first day of the next succeeding term thereafter, and in other instances in proceedings where sale of the real estate of a minor is sought.

Notice is usually by publication or posting, although sometimes it is personal. The statute directing the publication to be made does not limit the character of the newspaper in which same may be made otherwise than by requiring it to be in the county where the proceedings are pending in certain instances, and in others in the county in which the land to be sold is situated.

Section 4531 of Wilson's Statutes provides that "An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process in an action." The pro-

visions of this section are applicable to the various notices required to be given in a probate proceeding whether the service be personal, by posting, or publication. The affidavit should in every instance cover all that the statute requires to be done in posting the notice or in making the publication or personal service. For instance, if the affidavit is to prove service of notice, under Section 1662 it should state that such notice was posted in three of the *most* public places in the county in which the land is situated, naming the places, and if to prove publication that the same was published in a newspaper printed in the county for three weeks *successively next* before the sale. There is no requirement as to the character of the newspaper in which the publication shall be made in any of the sections relating to probate procedure, but Section 4006 of Wilson's Statute, being an Act of the Legislature approved March 6, 1907, provides that no legal notice required to be published "Shall have any force or effect as such unless published in a newspaper of the county having a general circulation therein, and which newspaper has been continuously and uninterruptedly published in said county during a period of fifty-two consecutive weeks prior to the first publication of the notice." There are several provisos, some of which are as follows: That of moving from one county to another or changing the name shall not constitute a break in the continuity of the publication, nor shall the failure to issue the paper for fourteen days on account of inability resulting from accident, fire, etc., or interruption by legal proceedings, be deemed a failure to maintain continuous and consecutive publication.

It is further provided in said Section that any newspaper that had been published and circulated one week prior to the taking effect of said Act shall be in law construed to have been continuously published for fifty-two weeks. Under this provision, perhaps any newspaper published and circulated one week prior to statehood in what was formerly Indian Territory, was upon the incoming of statehood legally authorized to publish legal notices. See Constitution, Bunn's Ed., Sec. 483. It is not readily apparent that this Section applies to notices in making probate sales. Such publications, however, are usually made in newspapers that have been published for more than a year, and it is not difficult to so make the affidavit as to show a compliance with this statute. County

courts are familiar with the length of time newspapers in their counties have been published, and notices should not be permitted to be published in papers which cannot in the proof of publication comply with the provisions of the Statute with reference to length and continuity of publication. The affidavit of publication should show that the newspaper had been published continuously for fifty-two weeks next preceding the first insertion of the notice; that the notice had been published consecutively in every issue of the paper from the day of its insertion to the day of final publication, and should show the date of the first and last insertions. It should also show whether the newspaper is a daily or a weekly paper, and, if both, whether published in the daily or weekly issue. The notice of posting should state the time and place thereof. The affidavit which states only that notice was posted at a town or city gives but little opportunity for ascertaining whether the place of posting was one of the most public places in the county or not. The affidavit of posting should in every instance show that the notice was posted at three of the *most* public places in the county, naming with some degree of particularity the place of posting, so that the court may determine the facts in reference thereto.

Defects in proof of notice of publication, of posting, or personal service are always subject to amendment to conform to the facts. Amendments, therefore, may be made at any time when the sufficiency of the affidavit is brought in question, provided always that the amendment is made for the purpose of making the proof conform to the facts as to the service.

Section 200. Return of sale and proceedings thereon.

The provisions of the statute requiring a return of the sale into the court, the procedure following such return, and the hearing thereon are prescribed in Sections 1667 and 1668 of Wilson's Statutes.¹

¹ SECTION 1667. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the probate court, which must be filed by the judge, at any time subsequent to the sale, either in term or vacation. If the sale be made at public auction and the return is made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction, a hearing upon the return of proceedings be

The return of the guardian should set out in fullest detail the proceedings had in execution of the order of sale and there should be attached to such return a copy of the notice posted with an affidavit as to the time and place of posting with the further statement that it was posted in three of the most public places in the county. The proof of publication should show the publication of the notice as required by statute and order of the court. It should not state a conclusion of the affiant, but should state the facts. The affidavit should disclose the character of the newspaper, whether daily or weekly, and that it is a newspaper of general circulation in the county, the date of each insertion and that it was published in each successive issue. While the publication in a daily newspaper once a week for three weeks might possibly be held a sufficient compliance with the statute, it is desirable that publication be made in each issue for three weeks successively. (See Wilson Stat., Sec. 1781.)

The affidavit should also show that the paper is one of the character prescribed in the statute in which a publication may be made. The return should be made thus in detail in order that upon request for confirmation the court may judicially determine whether the statute has been complied with. While the court may determine such facts upon a return omitting the details the record upon collateral attack will be stronger

asked for in the return, or is brought on for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the judge, by notices posted in three public places in the county, or by publication in a newspaper, or both, as he may deem best, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale.

SECTION 1668. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections.

if the guardian's report discloses in detail the entire facts touching the proceedings and that they were in accordance with the statute. If the statute has not been complied with in every particular or if the procedure is any wise defective the court may give an opportunity to cure the defect, if it can be done, and if not, may order a new sale, before the purchaser has been placed in a position where it will be difficult to put him *in statu quo*. If the return discloses serious defects or improper proceedings, the confirmation should be refused and a new sale ordered. Nothing that courts can do will give more stability to titles acquired at court sales of minor's lands than to require a full compliance with all the statutory provisions as a condition precedent to confirmation. Loose procedure in the sale of the real estate of a minor may result in evasions of the law and in a jurisdiction where so many titles are dependent upon probate sales much expensive and unnecessary litigation, disturbing titles, retarding the development of the country, and creating a cloud upon titles acquired at probate sales. Such results may be avoided by proper diligence of the attorneys representing the guardian and of the probate courts in observing and complying with every statutory provision regulating the sale of real estate of a minor.

Section 201. Confirmation of sale.

Section 1669¹ provides the procedure and directs when the sale of the real estate of a minor shall be confirmed. The terms of the Statute are neither difficult to understand nor to comply with. The order of confirmation should contain a recital showing a compliance with all of the provisions of the statute. Upon a request for a confirmation of a guardian's

¹ SECTION 1669. If it appear to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified can not be obtained, or if the increased bid mentioned in the second preceding section be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the register of deeds of the county within which the land sold is situated. If after the confirmation the purchaser neglects or refuses to comply with the terms of the sale, the court may, on motion of the executor or administrator and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

sale the court should make a careful investigation of the entire proceeding and ascertain whether or not the provisions of the statute have been complied with, if not it should not be confirmed. If they have been complied with, the court should find and enter of record in detail the facts of such compliance. The action of the court in its investigation and judicial determination of whether or not the various provisions of the statute have been complied with, should in case of collateral attack and in the absence of fraud, be treated as conclusive.

Section 1671, Wilson Statutes, especially requires that "before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed and the order of confirmation must show that such proof was made." It was undoubtedly the purpose of this statute to foreclose in the probate proceeding all questions relating to the giving of the notice of sale as required by statute.

Jurisdiction is not only conferred upon the county court on presentation of the guardian's return upon the order of sale to investigate and adjudge whether the provisions of the statute have been complied with, but the duty is imposed upon such court so to do. Such confirmation must be upon notice or at a time fixed by statute, of which all persons must take notice. There is every reason why an adjudication that the various provisions of the statute have been complied with should be *res adjudicata* in all subsequent controversies where the same questions of fact are involved.

A very broad discretion is conferred upon the county court in the matter of confirmation of the sales of real estate of minors. Such discretion should always be so exercised as to fully protect the interests of the minor. Proper regard, however, should be had for the rights of the prospective purchaser who is the highest and best bidder at the sale. He has rights both legal and moral which should receive due consideration in determining whether or not a confirmation of the sale will be ordered. (*Morrison v. Burnett*, 154 Fed. 617; *Estate of Arguello*, 50 Pac. 308; *Estate of Devincenzi*, 119 Cal. 491; 51 Pac. 845; *Terry v. Clotheir*, 25 Pac. 673, *Estate of Gibbs*, 6 Pac. 525; *Estate of Pearsons*, 98 Cal. 603, 33 Pac. 451; *Levy v. Riley*, 4 Ore. 398; *Mc-*

Callum v. Chicago Title, etc., Co., 203 Ill. 142, 67 N. E. 823, 21 Cyc. 136.)

Section 202. Conveyances.

Section 1670¹ of Wilson's Statutes, relating to the estates of decedents, is made applicable to the sale of the real estate of minors by Section 1852, and controls as to time, manner and procedure in the execution of conveyances by the guardian of the real estate of minors sold under order of court..

While the provisions of this section were not drawn with reference to conveyances of real estate of minors, inasmuch as they provide that the conveyance so made shall convey all the right, title, interest and estate of the decedent in the premises at the time of his death, it is assumed that the conveyance executed pursuant to the sale by order of the court of the real estate of a minor conveys all the right, title and interest of the minor in and to such real estate.

The purchaser at a guardian's sale does not acquire title on confirmation and payment of the purchase money. It is not only necessary the sale be confirmed by order of court duly entered, containing the necessary recitals, but it is necessary that the guardian's deed be executed and delivered. (21 Cyc., 139.)

Section 203. Sales for railroad purposes.

Under the provisions of Section 1043, Wilson's Statutes of Oklahoma,² it is provided that if a railroad corporation shall

¹ SECTION 1670. Conveyances must thereupon be executed to the purchaser by the executor or administrator and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing the conveyances thereof to be executed, and to the record of the order of confirmation in the office of the register of deeds, by the date, volume and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent, in the premises, at the time of his death, if, prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest in the premises, other than, or in addition to, that of the decedent at the time of his death, such right, title or interest also passes by such conveyance.

² SECTION 1043. Whenever any railroad corporation shall take any real property as aforesaid, of a minor, any person insane or otherwise incompetent, or of any married woman whose husband is under guardianship, the guardian of such minor, insane or incompetent person, or such married woman with the guardian of her husband, may agree and settle with said corporation for all damages or

take any real property of a minor, insane person or person otherwise incompetent, the guardian of such minor may agree and settle with said corporation for all damages or claims by reason of the taking of such real property and may give valid releases and discharges therefor upon the approval thereof by the judge of the probate court. This statute affords a means of acquiring the real estate of a minor for railroad purposes other than by condemnation. Under like statutes it has been held that a guardian has not authority to donate land for a right of way or station grounds to a railway company. The statute evidently contemplates that the minor shall receive fair compensation for the property taken or damage done, that when an agreement is reached the guardian shall make report of such agreement to the county court and that the judge thereof shall, if upon investigation, he finds that the settlement is not prejudicial to the interest of the minor, approve the same, which approval authorizes the use of the lands for railway purposes and discharges the railway company from liability arising from taking and using the same. (*Indiana, Bloomington & Western Ry. Co. v. Brittingham*, 98 Ind. 299; *The State v. Commissioners*, 39 Ohio State 58; Woerner on Guardianship, section 54.)

Section 204. Collateral attack on sale.

Upon a review by appeal or other proceeding, a failure to substantially comply with any of the provisions of the statute may furnish sufficient reason for a reversal of the order of sale or confirmation.

Where, however, the sale is attacked collaterally or in any proceeding other than by way of review of the action of the court ordering and confirming the sale, every presumption should be indulged in favor of the regularity of the sale. County courts are courts of general jurisdiction and their records are entitled to the same consideration and import the same verity, where dealing with the estates of minors, as do the records of courts of general jurisdiction.

The interest of the individual minor may be subverted by holding void a sale of his real estate, because of the failure

claims by reason of the taking of such real property, and may give valid releases and discharges therefore upon the approval thereof by the judge of the probate court.

to comply with some statutory provision affecting or controlling the procedure resulting in such a sale, but if technicalities may be availed of to have the sale of minors adjudged void, the great majority of purchasers will be deterred from bidding at such sales. The net result will be a very substantial reduction in the prices bid for the lands of minors so sold. Every decision of an appellate court rendering less stable the title acquired by sale upon order of a court, materially reduces the number of bidders who will purchase at such sale and thereby materially reduces the amount that may be realized thereon.

While every precaution should be taken to protect a minor against fraud and imposition, the desire to afford such protection should not be treated as a license to take from another that which he has purchased in good faith and paid for and the proceeds of which have been paid to the guardian for the minor.

It is only by giving the greatest stability possible to the title acquired by purchase at a probate sale of the real estate of a minor, that purchasers can be found who will pay the approximate value of such real estate when offered for sale. (*Thaw v. Ritchie*, 136 U. S. 519-547; *Kelly v. Morrell*, 29 Fed. 736; *Calloway v. Nichols*, 47 Tex. 331; *Whiteman v. Fisher*, 74 Ill. 152; *Benson v. Benson*, 70 Ind. 258; *Newbald v. Schlens*, 66 Md. 589; *Hamiel v. Donnelly*, 75 Iowa 93; *Schaale v. Wasey*, 70 Mich. 414; *Walker v. Goldsmith*, 14 Ore. 145; *Brazee v. Schofield*, 2 Wash. T. 220; *Fleming v. Johnson*, 26 Ark. 421; *Gwynn v. McCauley*, 32 Ark. 107; *Currie v. Franklin*, 51 Ark. 338; *Woerner on Guardianship*, Sec. 87, 21 Cyc. 141; *Montour v. Puerdy*, 11 Minn. 278; *Hurt v. Long*, 16 S. W. 968; *White v. Iselin*, 5 N. W. 359.)

Section 205. Guardianship of minor, when ceases.

When the guardianship over the estate of the minor terminates, the authority of the guardian to sell the real estate of the minor, must of necessity cease. The provisions of the Oklahoma Statute as to when the guardianship ceases are not entirely clear.

Under the provisions of Section 1865 of Wilson's Statute "the marriage of a minor ward terminates the guardianship."

Under Section 1820 of the same statute every guardian

appointed shall have the custody, and education of the minor and the care and management of his estate until such minor arrives at the age of majority or marries or until the guardian is legally discharged.

Section 3827 of Wilson's Statute is as follows:

"The power of a guardian appointed by a parent is superseded, first: by his removal as provided in section 3826. Second: by the solemnized marriage of the ward or by the ward's attaining majority."

Section 3828 of Wilson's Statute is as follows:

"The power of a guardian appointed by court is suspended only: First, by order of the court; second, if the appointment was made solely because of the ward's minority, by his obtaining majority; third, the guardianship over the person of the ward, by the marriage of the ward."

These provisions substantially in the same order as they are found in the Statutes of 1903 are found in the Statutes of 1890 and 1893, and were all adopted at the same time. The last provision in the statute is section 3828. If there is a conflict between this section and that which precedes it, this section should prevail. Section 3828 seems to be declarative of the common law rule. (21 Cyc., 51; 15 Cyc. 47; Woerner on Guardianship, Section 100.)

Whether the guardianship over the estate of the minor terminates upon marriage, under the various statutory provisions above quoted, is not free from doubt. When these various provisions are construed together, it is perhaps a fair inference that marriage terminates the guardianship over the person but majority alone terminates the guardianship over the estate.

This question is now before the Supreme Court of Oklahoma for its consideration in the case of *Spring v. Glenn* and *Jefferson v. Winkle*. And it is hoped that an early and authoritative determination of the question may be obtained.

Section 206. Approval by secretary.

By the provisions of Section 22 of the Act of April 26, 1906, the conveyances made thereunder of inherited lands are subject, where the heirs are full-bloods, to the approval of the Secretary of the Interior. And this is true whether the conveyance is by adult or by guardian of the estate of a minor upon

an order of court authorizing such sale. It will be observed, however, that it is only "conveyances made under this provision" that are subject to the approval of the Secretary. The proper construction of this Act contemplates the approval of the Secretary of only such sales as could be lawfully made under the provisions of the Act of April 26, 1906, and not otherwise. If the lands were alienable before the passage of this Act, or thereafter became alienable under the provisions of existing laws or agreements, or by virtue of subsequent legislation, the Secretary's approval is not necessary.

This is the construction given this section by the Department of the Interior shortly after it became a law and which has been constantly adhered to, and under which sales have been made without departmental approval, to such an extent that such construction may be considered to have become a rule of property. The opinion of the Assistant Attorney-General, giving this construction to the statute as approved by the Secretary of the Interior, is as follows:

DEPARTMENT OF THE INTERIOR.

OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

WASHINGTON.

24788-1906
Int. Ter. Div.

January 29, 1907.

The Secretary of the Interior.

Sir: You have submitted the papers relating to the approval of the deed executed under the direction of the United States court by the curator of the estate of Willis and Richardson Watson, minor full-blood Choctaw Indians, covering 120 acres of land originally allotted to their father, Robinson Watson, saying:

In view of sections 19, 20 and 22 of the act of Congress approved April 26, 1906 (34 Stat. 137), your opinion is requested in the matter.

The land in question being the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, the northeast quarter of the northwest quarter of the southwest quarter, the north half of the northeast quarter of the southwest quarter and the northwest quarter of the northwest quarter of the southwest quarter, Sec. 25, T. 5 S., R. 1. E. in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead, May 28, 1903, and homestead patent executed in his favor was filed for record in the office of the commission to the Five Civilized Tribes September 18, 1905.

It is alleged in the petition for the sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the land belonging to the estate of their deceased father, Robinson Watson, March 31, 1906, after due notice thereof, C. D. Wortham, as Curator, filed in the United States court for the Southern District of the Indian Territory application to sell said

real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12, 1906, and appraisers were appointed to view and appraise the property. They appraised it for \$1,200 and the property was sold May 12, for \$1,100. This sale was subsequently approved by the court and deed executed thereon, May 14, 1906. In view of the provisions of section 22 of the act of April 26, 1906, the Department has been asked to give its approval to this sale.

In the act of June 28, 1898 (30 Stat. 495, Sec. 29) it was provided that each allottee of the Choctaw and Chickasaw Tribes of Indians should select from his allotment a homestead of one hundred and sixty acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the act of July 1, 1902 (32 Stat. 641) it is provided that each member of said tribes shall at the time of selecting his allotment designate as homestead land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations "which shall be inalienable during the life time of the allottee, not exceeding twenty-one years from the date of the certificate of allotment, and separate certificate and patent shall issue for said homestead."

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restrictions upon alienation.

The act of April 28, 1904 (32 Stat. 573), contains the following provision:

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indian, freedman, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman, or otherwise.

These minors and their lands, held by them free from any restrictions upon alienation, were within the jurisdiction of the United States Court as described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to section 19, 20 and 22 of the act approved April 26, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or of incumber in any manner, any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress." This provision related to allottees, and has no bearing on the question here presented. Section 20 refers exclusively to leases and rental contracts and does not effect this case. Section 22 reads as follows:

That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of the State or Territory, then by the proper court of the county in which said minor or minors may reside or in

which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

This section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It can not, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the act of July 1, 1902, *supra*, is that they may be alienated one-fourth in acreage in one year; one-fourth in three years; and the balance in five years from the date of patent. There is no permissible construction of said section 22 except that it applies, so far as the Choctaws and Chickasaws are concerned to these surplus lands which descend to the heirs burdened with the restrictions upon alienation and not to the homestead which descend to the heirs freed of all such restrictions.

If this be the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are herewith,

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved:

January 29, 1907,

E. A. HITCHCOCK,
Secretary.

Substantially the same construction was given this statute by the Supreme Court of the State of Oklahoma in the case of *Western Investment Company v. Tiger*, 96 Pac. 602.

This provision was superseded by the provision of Act of May 27, 1908. It is provided in Section 9 of said Act "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon alienation of said allottee's lands; provided, no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of such deceased allottee." Other provisions of the same Act confer complete jurisdiction over the persons and property of minor allottees upon the courts of the State of Oklahoma exercising probate jurisdiction.

The Act of May 27, 1908, covers the entire subject of the alienation by full-blood heirs and fixes a procedure for the com-

pletion and approval of the sale of the inherited lands of such full-blood heirs different from that contained in the Act of April 26, 1906, which is the substitution of one method of procedure for another and the approval of one official for the approval of another and this is but a just and proper recognition of the probate jurisdiction of the courts of the State of Oklahoma.

There is no line of demarcation drawn between those who inherited prior and those who inherited subsequent to May 27, 1908. The provision for approval by the court applies "to any full-blood Indian heir" and is not limited to full-blood heirs who inherited subsequent to May 27, 1908.

A consideration of the provisions of the Act of May 27, 1908, is convincing that it was intended to supersede the provisions of the previous acts of Congress relating to the same matters covered by the provisions of said Act and to fix one method of procedure applicable to the allottees of all of the Five Civilized Tribes and to full-blood heirs of the allottees of all of the said Five Civilized Tribes.

The purpose of the Act of May 27, 1908, as declared in the caption, is the removal of restrictions from parts of the lands of the allottees of the Five Civilized Tribes and it is declared in the first section that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act."

Section 22 of the Act of April 26th, 1906, specifically authorized the conveyance by the heirs of any deceased Indian of his inherited land. This is a direct removal of all restrictions upon alienation then existing. Conveyance by full-blood heirs were made subject to approval by the Secretary of the Interior. Under the Act of May 27th, they were required to be approved by the County Court having jurisdiction of the estate. Restrictions upon alienation were as effectually removed by the Act of April 26, 1906, as by the Act of May 27, 1908, and the latter Act merely substituted one method of perfecting conveyance for another. The word "shall" in the latter Act was used in the imperative sense and not to denote futurity. It is death and not the date thereof that operates to remove restrictions under the

provisions of both of said Acts. The Attorney General of the United States has recently held to the contrary, which ruling is apparently in direct conflict with the practice of that Department under the provisions of said Act.

Morrison v. Burnett, 154 Fed., 622; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W., 378; *Maysville & Lexington R. R. Co. v. Herrick*, 13 Bush., 122; *Hannibal, etc., R. Co. v. State Board of Equalization*, 64 Mo., 304; *Blake v. Pine Mt. Iron, etc., Co.*, 76 Fed., 656; *Ex parte Jordan*, 94 U. S., 251.

Section 207. Age and quantum of Indian blood.

The practical difficulties arising in determining the quantum of Indian blood of members of the Five Civilized Tribes render it not only desirable but necessary that if possible some standard be fixed that will not be variable or subject to future controversy. That this necessity existed was not discovered by Congress until after restrictions upon alienation had been removed or had ceased to exist as to a very considerable part of the lands allotted to the members of the Five Civilized Tribes and the Freedmen thereof.

The first effort to control this subject is found in Section 19 of the Act of April 26, 1906 (Section 583 hereof), which is as follows:

“And for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior.”

Prior to April 26, 1906, no legislation had been enacted by the terms of which the right to alienate depended upon the quantum of Indian blood, except in so far as the Act of April 21, 1904, permitting alienation of surplus lands of members of the tribes who were not of Indian blood may be considered as requiring a determination of the quantum of Indian blood for the purposes of alienation. The determination of whether or not a member of the tribe is a member by blood does involve in a sense the question of the quantum of Indian blood.

The names of those allottees who were permitted to alien-

ate under the Act of April 21, 1904, appeared upon separate rolls showing that such allottees acquired their right to enrollment by virtue of intermarriage, adoption, or by having been slaves of a member of some one of the Five Civilized Tribes. It is not probable that in a subsequent controversy members thus enrolled acquiring the right to take and hold an allotment by virtue of intermarriage, adoption, or being a Freedman, and who secured enrollment upon the separate rolls as citizens by intermarriage, adoption, or on account of being a Freedman, would thereafter be permitted for the purpose of assailing their own conveyance to assert that they are of Indian blood.

Was it the purpose of Congress by the insertion of the provision above quoted in the Act of April 26, 1906, to make a rule applicable to all future transactions where the quantum of Indian blood came in a controversy, or was it intended to apply to only those cases where the quantum of Indian blood became subject to controversy under the terms of the Act in which the provision is inserted?

Under the provisions of said Act the quantum of Indian blood is material in only two cases. One in determining whether or not an enrolled member is a full-blood for the purpose of ascertaining if he belongs to that class as to which restrictions upon alienation are extended for the period of twenty-five years by the provisions of said Act. The other for the purpose of ascertaining whether an enrolled member is a full-blood, and therefore an approval of the conveyance of his inherited land by the Secretary of the Interior is required.

It is probable that a proper construction of this Act limits it to questions arising thereunder. If it was intended to apply to all character of transfers and to the right to convey of those members of the tribes who held their lands free from the restrictions upon alienation, or to the right to convey lands acquired otherwise than by allotment or inheritance it would perhaps be subject to constitutional objection as invading the province of the judiciary by pre-determining and foreclosing an investigation into the truth of the matter of the quantum of Indian blood.

If it was intended to have this sweeping effect (and it is not probable that it was) its application is perhaps materially

modified by the provisions of the Act of May 27, 1908, which limits the conclusiveness of the rolls as evidence of the quantum of Indian blood to questions arising under that Act.

The Act of May 27, 1908, is the first legislation which by direct provision removed restrictions upon alienation by minor allottees of the Five Civilized Tribes. This Act provides that minority shall continue as to males until they arrive at the age of twenty-one years, and as to females until they arrive at the age of eighteen years, and "that the rolls of citizenship and of Freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or Freedman of said tribes and of no other persons to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

Is the age of an enrolled citizen as evidenced by the enrollment records conclusive only in controversies where the right to alienate is exercised under the provisions of the Act of May 27, 1908, or does it apply in all controversies which may subsequently arise involving the age of such an enrolled member or Freedmen without regard to whether or not the right to alienate existed at the time of the approval of the Act? If it applies to all transactions it would of necessity apply to lands purchased or acquired otherwise than by allotment or inheritance from an allottee. If it be given this broad application it is difficult to see how its constitutionality can be sustained, because by its terms it would perhaps declare a member to be a minor who was in fact of full age, and thereby perhaps declare a conveyance invalid which in truth and in fact was valid, and would be so determined upon proper judicial inquiry.

It is perhaps a fair interpretation of this Act to limit the application of the rule of evidence prescribed therein to conveyances authorized or permitted thereby. By so doing its constitutionality can be sustained as fixing a basis for the removal of the restrictions upon alienation rather than as fixing a conclusive rule of evidence.

PART II.

LEGISLATION AFFECTING THE TITLE TO LANDS WITHIN THE DOMAIN OF THE FIVE CIVILIZED TRIBES.

CHAPTER XLIII.

EXTRACTS FROM ACT OF MARCH 3, 1893

(27 STAT. AT L. 645.)

Section 208. Citizenship.

[15] The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

Section 209. Dawes Commission created.

[16] The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each

of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within the said Indian Territory.

Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiation with the several nations of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and suited to the circumstances; for which purpose, after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the land of any such nation or tribe, or band to be surveyed and the proper allotment to be designated; and secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation, or tribes, or bands, or to any of the Indians thereof, for the extinguishment of their (interests) therein. But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a State in the Union.

Section 210. Negotiations not to affect authority of United States.

Neither the provisions of this section nor the negotiations or agreements which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the Government of the United States has over or respecting the said Indian Territory or the people thereof, or any other right of the Government relating to said Territory, its lands, or the people thereof.

CHAPTER XLIV.

EXTRACTS FROM ACT OF JUNE 10, 1896 (29 Stat. L. 339.)

Section 211. Jurisdiction conferred upon Commission.

That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

Section 212. Citizenship, trial, and appeal.

In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determin-

ing the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days and the judgment of the court shall be final.

Section 213. Time for completion of rolls.

That the said Commission after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein.

Section 214. Rolls to be filed.

The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. And said Commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount, and value of the property leased and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of the members of the tribes and others.

Section 215. Government of Indian Territory.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof.

CHAPTER XLV.

EXTRACTS FROM ACT OF JUNE 7, 1897 (30 STAT. L. 83).

Section 216. Complete jurisdiction conferred upon United States courts.

That the Commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities: *Provided further*, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts. (30 Stat. 83.)

Section 217. Commission to complete tribal rolls.

That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council

of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nations, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected, shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also*, That anyone whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six. (30 Stat. 83.)

Section 218. Approval acts of Indian Councils required.

That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect if disapproved by him or until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes.

Section 219. Appeals allowed—citizenship cases.

Appeals shall be allowed from The United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceed-

ing in or order of any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible. (30 Stat. 591, effective July 1, 1898.)

CHAPTER XLVI.

EXTRACTS FROM ACT OF MAY 31, 1900

(31 STAT. L. 221).

Section 220. Authority of Commission continued.

That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior. (32 Stat. 236.)

Section 221. Mississippi Choctaws.

Provided, That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be enrolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment. (32 Stat. 236.)

Section 222. Contracts affecting lands Mississippi Choctaws prohibited.

Provided further, That all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws shall be null and void. (32 Stat. 237.)

Section 223. Provision for laying out townsites.

Provided, That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks, the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. (32 Stat. 237.)

The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each townsite, which, when the survey

is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interest of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of townsites in any of said nations by contract.

Hereafter the work of the respective townsite commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the Act of June twenty-eight, eighteen hundred and ninety-eight, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes," shall begin as to any townsite immediately upon the approval of the survey by the Secretary of the Interior and not before.

The Secretary of the Interior may in his discretion appoint a townsite commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee nation a separate townsite commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that nation. Every such local commission shall be appointed in the manner provided in the act approved June

twenty-eight, eighteen hundred and ninety-eight entitled "An act for the protection of the people of the Indian Territory." (31 Stat. 237.)

Section 224. Laying out of townsites authorized.

The Secretary of the Interior, where in his judgment the public interest will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances. (31 Stat. 238.)

Section 225. Appraisement and sale authorized.

As soon as the plat of any townsite is approved the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

The Secretary of the Interior may, for good cause remove any member of any townsite commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled. (31 Stat. 238.)

Section 226. Corporate and townsite limits may differ.

It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such townsite limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the exterior limits of all townsites shall be designated and fixed at the earl-

iest practicable time under rules and regulations prescribed by the Secretary of the Interior. (31 Stat. 238.)

Section 227. Commission may segregate lands for townsites.

Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee Nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time. Such townsites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other townsites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior.

Nothing herein contained shall have the effect of avoiding any work heretofore done in pursuance of the said act of June twenty-eight, eighteen hundred and ninety-eight, in the way of surveying, laying out, or platting of town sites, appraising or disposing of town lots in any of said nations, but the same, if not heretofore carried to a state of completion, may be completed according to the provisions hereof. (31 Stat. 238.)

CHAPTER XLVII.

EXTRACTS FROM ACT OF MARCH 3, 1901 (31 STAT. L. 1077.)

Section 228. Rolls made by Commission to be final—when.

The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or either of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto. (31 Stat. 1077.)

Section 229. Acts of Cherokee Council not binding until approved.

That no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity until approved by the President of the United States. When such acts, ordinances or resolutions, passed by the council of either of said tribes shall be approved by the principal chief thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same. (31 Stat. 1077.)

CHAPTER XLVIII.

EXTRACTS FROM APPROPRIATION ACT OF MAY 27, 1902 (32 STAT. L. 258).

Section 230. Certain Creek children to be added to rolls.

Provided, That said Commission shall exercise all the powers heretofore conferred upon it by Congress: *Provided further*, That all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, nineteen hundred and one, and then living, shall be added to the rolls of citizenship of said nation made under the provisions of an act entitled "An act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes," approved March first, nineteen hundred and one, and if any such child has died since the twenty-fifth day of May, nineteen hundred and one, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs and be allotted and distributed to them accordingly. (32 Stat. 258.)

Section 231. Laws of descent of Arkansas substituted for Creek laws of descent.

And Provided further, That the act entitled "An act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes," approved March first, nineteen hundred and one, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory. (32 Stat. 258.)

Section 232. Towns where population less than two hundred.

Provided, That hereafter the Secretary of the Interior may, whenever the chief executive of the Choctaw or Chickasaw Nations fails or refuses to appoint a townsite commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the townsite commissioner, appointed by the chief executive of the Choctaw or Chickasaw nations to qualify or act, in his discretion, appoint a commissioner to fill the

vacancy thus created: *Provided further*, That the limits of such towns in the Cherokee, Choctaw, and Chickasaw nations having a population of less than two hundred people, as in the judgment of the Secretary of the Interior should be established, shall be defined as early as practicable by the Secretary of the Interior in the same manner as provided for towns having over two hundred people under existing law, and the same shall not be subject to allotment. That the land so segregated and reserved from allotment shall be disposed of, in such manner as the Secretary of the Interior may direct, by a townsite commission, one member to be appointed by the Secretary of the Interior and one by the executive of the nation in which such land is located; proceeds arising from the disposition of such lands to be applied in like manner as the proceeds of other lands in townsites. (32 Stat. 259.)

Section 233. Removal of intruders.

For the purpose of removing intruders and placing allottees in unrestricted possession of their allotments, to be expended under the direction of the Secretary of the Interior and to be immediately available, fifteen thousand dollars; in all, one hundred and sixty thousand dollars: *Provided, however*, That it shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a townsite under existing laws and treaties, and no part of this appropriation shall be used for the deportation or removal of any such person from the Indian Territory. (32 Stat. 259.)

Section 234-5. Reasonable share of tribal lands.

Provided, That the just and reasonable share of each member of the Chickasaw, Choctaw, Creek, and Cherokee Nations of Indians, in the lands belonging to said tribes, which each member is entitled to hold in his possession until allotments are made, as provided in the act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eight, eighteen hundred and ninety-eight, be, and the same is hereby, declared to be three hundred and twenty acres for each member of the Chickasaw Nation, three hundred and twenty acres for each member of the Choctaw Nation, one hundred and sixty acres for each member of the Creek Nation, and one hundred acres for each member of the Cherokee Nation. (32 Stat. 259-60.)

CHAPTER XLIX.

EXTRACTS FROM APPROPRIATION ACT OF MARCH 3, 1903 (32 STAT. L. 982).

Section 236. Transfers to citizenship court authorized.

The Supreme Court of the United States may transfer to the Choctaw and Chickasaw citizenship court the papers in the cases of Choctaw and Chickasaw citizenship appealed from the United States courts in the Indian Territory to the Supreme Court during the year eighteen hundred and ninety-eight.

That all causes transferred under section thirty-one of the Act of Congress of July first, nineteen hundred and two, entitled, "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes", to the citizenship court for the Choctaw and Chickasaw nations provided in said act shall be tried and determined under the provisions of section thirty-two of said act and disposed of the same as if appealed to such court under the provisions of section thirty-two of the said act.

Section 237. Restrictions upon alienation removed for townsite purposes.

And provided further, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior. That hereafter the Secretary of the Interior may, whenever the chief executive of the Choctaw or Chickasaw nations fails or refuses to appoint a townsite commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the townsite commissioner appointed by the chief executive of the Choctaw or Chickasaw nations to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created.

Section 238. Seminole government to expire and patents to be issued.

[8]. That the tribal government of the Seminole

Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided, further*, That the homestead referred to in said act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

CHAPTER L.

EXTRACTS FROM ACT OF APRIL 21, 1904

(33 STAT. L. 204).

Section 239. Authority of Commission—continued.

Provided, That said Commission shall exercise all the powers heretofore conferred upon it by Congress; and *provided further*, That the Secretary of the Interior is hereby granted authority to sell at public sale in tracts not exceeding one hundred and sixty acres to any one purchaser, under rules and regulations to be made by the Secretary of the Interior, the residue of land in the Creek Nation belonging to the Creek Tribe of Indians, consisting of about five hundred thousand acres, and being the residue of lands left over after allotments of one hundred and sixty acres to each of said tribe.

Section 240. Alienation—removal of restrictions.

And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interests of said allottee. The finding of the United States Indian Agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.

Section 241. Preliminary Cherokee allotments confirmed.

That no proceedings heretofore had with respect to allotments in the Cherokee Nations shall be held invalid on the ground that they were had before there was authority to begin the work of allotment in said nation: *Provided*, That nothing herein shall be construed as validating any filings heretofore made on lands segregated for the Delaware Indians.

Section 242. Delaware-Cherokee controversy.

That the Delaware-Cherokee citizens who have made

improvements, or are in rightful possession of such improvements, in the Cherokee Nation at the time of the passage of this act shall have the right to first select from said improved lands their allotments, and thereafter, for a period of six months, shall have the right to sell the improvements upon their surplus holdings of lands to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose; and the vendor shall have a lien upon the rents and profits of the land on which the improvements are located for the purchase money remaining unpaid; and the vendor shall have the right to enforce such lien in any court of competent jurisdiction. The vendor, may, however, elect to take and retain the possession of the land at a fair cash rental, to be approved by the official so as aforesaid designated, until such rental shall be sufficient to satisfy the unpaid purchase price, and when the purchase price is fully paid he shall forthwith deliver possession of the land to the purchaser: *Provided, however,* That any crops then growing on the land shall be and remain the property of the vendor, and he may have access to the land so long as may be necessary to cultivate and gather such growing crops. Any such purchaser shall, without unreasonable delay, apply to select as an allotment the land upon which the improvements purchased by him are located, and shall submit with his application satisfactory proof that he has in good faith purchased such improvements.

Section 243. Sale of coal and asphalt lands.

That the Secretary of the Interior be, and he is hereby, authorized and directed, upon the sale of lands in Indian Territory covered by coal and asphalt leases, to sell such lands subject to the right of the lessee to use so much of the surface as may be needed for coke ovens, miners' houses, store and supply buildings, and such other structures as are generally used in the production and shipment of coal and coke. Lessees may use the tipples and underground workings located on any lease in the production of coal and coke from adjoining leases, and are hereby authorized to surrender leased premises to the owner thereof on giving sixty days' notice in writing to such owner and paying all charges and royalties due to the date of surrender: *Provided, however,* That nothing herein contained shall release the lessee from the payment of the stipulated royalty so long as such lessee remains in possession of any of the

surface of the lands included in his lease for any purpose whatever: *And provided*, That any lessee may remove or dispose of any machinery, tools, or equipment the lessee may have upon the leased lands.

Section 244. Court of Claims to determine rights of intermarried whites.

That the act entitled, "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes", approved October first, eighteen hundred and ninety, be, and the same is hereby, amended so as to confer upon the Court of Claims the same jurisdiction to determine the claims and rights of those alleged citizens of the Cherokee Nation known as intermarried whites, as is therein conferred upon said court relative to the rights and claims of the Shawnee and Delaware Indians and the freedmen of said Cherokee Nation, and said case shall be advanced on the calendar of said Court of Claims and the calendar of the Supreme Court, if the same is appealed.

Section 245. Choctaw and Chickasaw unallotted lands.

All unleased lands which are by section fifty-nine of an act entitled "An act to ratify and confirm, an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," approved July first, nineteen hundred and two, directed to "be sold at public auction for cash," and all other unleased lands and deposits of like character in said nations segregated under any act of Congress, shall, instead, be sold under direction of the Secretary of the Interior in tracts not exceeding nine hundred and sixty acres to each person, after due advertisement, upon sealed proposals, under regulations to be prescribed by the Secretary of the Interior and approved by the President, with authority to reject any or all proposals: *Provided*, That the President shall appoint a commission of three persons, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, and one upon the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood, which commission shall have a right to be present at the time of the opening of bids and be heard in relation to the acceptance or rejection thereof.

CHAPTER LI.

EXTRACTS FROM ACTS OF APRIL 28, 1904.

Section 246. Providing for additional judges.

[1]. That there shall be appointed by the President, by and with the advice and consent of the Senate, four additional judges of the United States court in the Indian Territory, one for the northern district, one for the western district, one for the central district, and one for the southern district. And said judges shall have all the authority and exercise all the powers, perform like duties, and receive the same salary as other judges of said court; and shall each serve for a term of four years from date of appointment, unless said offices are sooner abolished by law. Neither the additional judges, nor their successors in office, shall be members of the court of appeals for the Indian Territory, but they shall hold such courts in their respective districts, as may be directed by the court of appeals of the Indian Territory, or majority of the judges thereof in vacation: *Provided*, That none of said judges shall have power to appoint clerks of courts, United States Commissioners, or United States constables in said districts, and hereafter at least three terms of court shall be held in each year, at each place of holding court in the Indian Territory, the times to be fixed in the manner now provided by law. (33 Stat. 573.)

Section 247. Arkansas law extended to persons and estates of Indians and Freedmen.

[2]. All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise. (Superseded by Oklahoma Statutes, November 16th, 1907.) (33 Stat. 573.)

Section 248. Certain lands reserved from allotment.

[1]. That the Secretary of the Interior is hereby authorized and empowered to segregate and reserve from allotment, and to cancel any filings or applications that may heretofore have been made with a view to allotting the following described lands, situate in the Choctaw Nation, to-wit: The north half of the south half of the southeast quarter, and the northeast quarter of the southeast quarter of the southwest quarter of section nine; the north half of the south half of the south half of section ten; the north half of the south half of the south half of section eleven, and the north half of the south half of the southwest quarter of section twelve, all in township five north, range nineteen east, containing two hundred and fifty acres, more or less; and the northwest quarter of the southwest quarter of section eight, township five north, range nineteen east, and the southwest quarter of the northeast quarter of section seven, township five north, range nineteen east, containing, eighty acres, more or less. (33 Stat. 544.)

Section 249. Authorizing disposition of lands reserved.

[2]. That the provisions of sections fifty-six to sixty-three inclusive, of the act of Congress approved, July first, nineteen hundred and two, entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes, and for other purposes", be, and the same are hereby, made applicable to the lands above described, the same as if the said described lands had been made a part of the segregation, as contemplated by said sections fifty-six to sixty-three, inclusive, of said above act approved July first, nineteen hundred and two: *Provided*, That the Secretary of the Interior may, in his discretion, add said lands to and make them a part of the coal and asphalt mining leases now in effect, and to which said lands above described are contiguous, the lands in each case to be added to and made a part of the lease to which they are adjacent and which they join, Government subdivisions being followed as nearly as possible: *Provided further*, That the holder or holders of the lease or leases to which such lands shall be added, shall, before the same are added, pay the Indian or Indians who have filed upon or applied for such lands as their allotments, or who are in possession thereof, the value of the improvements placed on the land, by said Indian or Indians, such value to be determined under the direction of the Secretary of the Interior; *And provided further*, That said lands shall be sold as

other leased coal or asphalt lands in the Choctaw and Chickasaw Nations in the Indian Territory are sold. (33 Stat. 544.)

Section 250. Choctaw Railway Company authorized to execute lease.

[3]. That the Choctaw, Oklahoma & Gulf Railroad Company is hereby authorized and empowered to sublet, assign, transfer, and set over the leases which it now has upon coal lands in Choctaw Nation, Indian Territory, or any of them. The assignees or sublessees of said Choctaw, Oklahoma & Gulf Railroad Company shall file good and sufficient bonds for the faithful performance of the terms of the original leases, to be approved by the Secretary of the Interior. (33 Stat. 544.)

CHAPTER LI.

INDIAN APPROPRIATION ACT MARCH 3, 1905

(33 STAT. 1059.)

Section 251. Townsites.

Provided, That the several townsite commissions in the Choctaw, Chickasaw, Creek, and Cherokee Nations shall, upon the completion of the appraisement of the town lots in their respective nations, be abolished by the Secretary of the Interior at such time as in his judgment it is considered proper; and all unfinished work of such commissions, the sale of town lots at public auctions, disposition of contests, the determination of the rights of the claimants, and the closing-up of all other minor matters appertaining thereto shall be performed by the Secretary of the Interior under such rules and regulations as he may prescribe: *Provided further,* That all unsold lots, the disposition of which is required by public auction, shall be offered for sale and disposed of from time to time by the Secretary of the Interior for the best obtainable price as will in his judgment best subserve the interests of the several tribes; and the various provisions of law in conflict herewith are modified accordingly.

Section 252. Commission's work transferred to secretary.

Provided, that the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five.

Section 253. Investigation of leases of allotted lands authorized.

It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case wherein his opinion the evidence warrants it refer the matter to the Attorney-General for suit in the proper United States court to cancel the same.

and in all cases where it may appear to the court that any lease was obtained by fraud, or in violation of such agreements, judgment shall be rendered canceling the same upon such terms and conditions as equity may prescribe, and it shall be allowable in cases where all parties in interest consent thereto to modify any lease and to continue the same as modified: *Provided*, That no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General; *Provided further*, No lease made by any administrator, executor, guardian or curator shall be valid or enforceable without the approval of the court having jurisdiction of the proceeding.

Section 254. Individual restrictions removed.

That all restrictions as to the sale, incumbrance or taxation of the lands, heretofore allotted or that may be allotted to Mrs. Jennie O. Morton, of Ramona, Indian Territory, or to Fred A. Kerr, of Hereford, Indian Territory, both citizens of the Cherokee Nation, and duly enrolled as such, be, and the same hereby are, removed.

Section 255. Appeals allowed in Cherokee citizenship case.

That in the case entitled "In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, Departmental Numbered Seventy-Six", now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing.

Section 256. Delaware-Cherokee controversy.

That Delaware-Cherokee citizens who have made improvements, or were in rightful possession of such improvements upon lands in the Cherokee Nation on April twenty-first, nineteen hundred and four to which there is no valid adverse claim, shall have the right within six months from the date of the approval of this Act to dispose of such improvements to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by

the President for that purpose and the amount for which said improvements are disposed of, if sold according to the provisions of this Act, shall be a lien upon the rents and profits of the land until paid, and such lien may be enforced by the vendor in any court of competent jurisdiction: *Provided*, That the right of any Delaware-Cherokee citizen to dispose of such improvements shall, before the valuation at which the improvements may be sold, be determined under such regulations as the Secretary of the Interior may prescribe.

Section 257. Applications for enrollment.

That the Commission to the Five Civilized Tribes is hereby authorized for sixty days after the date of the approval of this Act to receive and consider applications for enrollment of infant children born prior to September twenty-fifth, nineteen hundred and two, and who were living on said date, to citizens by blood of the Choctaw and Chickasaw tribes of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this Act; and to enroll and make allotments to such children.

Section 258. Closing rolls—Choctaws and Chickasaws.

That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this Act to receive and consider applications for enrollments of children born subsequent to September twenty-fifth, nineteen hundred and two, and prior to March fourth, nineteen hundred and five, and who were living on said latter date, to citizens by blood of the Choctaw and Chickasaw tribes of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this Act; and to enroll and make allotments to such children.

Section 259. Closing rolls—Creeks.

That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this Act to receive and consider applications for enrollments of children born subsequent to May twenty-fifth, nineteen hundred and one, and prior to March fourth, nineteen hundred and five, and living on said latter date, to citizens of the Creek tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this Act; and to enroll and make allotments to such children.

Section 260. Closing rolls—Seminoles.

That the Commission to the Five Civilized Tribes is authorized for ninety days after date of the ap-

proval of this Act to receive and consider applications for the enrollment of infant children born prior to March fourth, nineteen hundred and five, and living on said latter date, to citizens of the Seminole Tribe whose enrollment has been approved by the Secretary of the Interior; and to enroll and make allotments to such children giving to each an equal number of acres of land, and such children shall also share equally with other citizens of the Seminole Tribe in the distribution of all other tribal property and funds.

Section 261. Sale of unallotted Creek lands.

That the provision in the Indian appropriation bill for the fiscal year ending June thirtieth, nineteen hundred and four, authorizing the Secretary of the Interior to sell the residue of the lands of the Creek Nation not taken as allotments is hereby repealed and the provision of the Creek agreement, Article III, approved March one, nineteen hundred and one, is hereby restored and re-enacted.

That the Secretary of the Interior shall make an investigation and definitely ascertain what amount of land, if any, belonging to the Creek Nation, has been taken and allotted to the members of the Seminole Tribe and arrange payment to the Creek Nation for such land if there be anything due by the Seminole Nation.

That the improvements of Seminole citizens upon Creek lands and the improvements of Creek citizens upon Seminole lands that are unpaid for by said allottees shall be investigated by the Secretary of the Interior and paid for by said nations, respectively.

CHAPTER LIII.

INDIAN APPROPRIATION ACT JUNE 21, 1906 (34 STAT. 338).

Section 262. Reservations from allotment—Choctaw and Chickasaw Nations.

That there shall be reserved from allotment one acre of the unallotted lands of the Choctaw and Chickasaw tribes for each church under the control of or used exclusively by the Choctaw or Chickasaw freedmen; and there shall be reserved from allotment one acre of said lands for each school conducted by Choctaw or Chickasaw freedmen, under the supervision of the authorities of said tribes and officials of the United States, and patents shall issue, as provided by law, to the person or organization entitled to receive the same. There are also reserved such tracts from said lands as the Secretary of the Interior may approve for cemeteries; and such cemeteries may be reserved, respectively, for Indians, freedmen, and whites, as the Secretary may designate.

Section 263. Reservations from allotment—Choctaw and Chickasaw Nations.

That the Secretary of the Interior is hereby authorized and empowered to segregate and reserve from allotment and to cancel any filings or applications that may heretofore have been made with a view to allotting the following-described lands, situate in the Choctaw Nation, Indian Territory, to-wit: The northwest quarter of section twelve, in township five north, range fifteen east, containing in the aggregate one hundred and sixty acres more or less. That the provisions of sections fifty-six to sixty-three, inclusive, of the Act of Congress approved July first, nineteen hundred and two, entitled, "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes, and for other purposes," be, and the same are hereby, made applicable to the lands above described, the same as if the said described lands had been made a part of the segregation as contemplated by said sections fifty-six to sixty-three, inclusive, of said above Act approved July first, nineteen hundred and two: *Provided*, That the Secretary of the Interior may, in his discretion, add to and make a part of the coal mining leases now in ef-

fect, and to which said lands are contiguous, the northwest quarter of section twelve, in township five north, of range fifteen east, Government subdivisions being followed as nearly as possible: *Provided, further,* That the holder or holders of the lease or leases to which such lands shall be added, shall before the same are added, pay the Indian or Indians who have filed upon or applied for such lands as their allotments, or who are in possession thereof, the value of the improvements placed on the land by said Indian or Indians, such value to be determined under the direction of the Secretary of the Interior. (34 Stat. 338-9.)

Section 264. Tribal rolls to be prepared.

That the Secretary of the Interior shall upon completion of the approved rolls, have prepared and printed in a permanent record book such rolls of the Five Civilized Tribes and that one copy of such record book shall be deposited in the office of the recorder in each of the recording districts for public inspection. That any person who shall copy any roll of citizenship of the Creek, Cherokee, Choctaw, Chickasaw or Seminole Tribes of Indians, prepared by or under the direction of the Secretary of the Interior, the Commission to the Five Civilized Tribes or the Commissioner to the Five Civilized Tribes, whether completed or not, or any person who shall, directly or indirectly, exhibit, sell, offer to sell, give away, offer to give away, or in any manner or by any means offer to dispose of, or who shall have in his possession, any such roll or rolls, any copy of the same, or a copy of any portion thereof, shall be deemed guilty of a misdemeanor, and be punished by imprisonment for not exceeding two years: *Provided,* That this Act shall not apply to any persons authorized by the Secretary of the Interior, the Commissioner of Indian Affairs, or the Commission to the Five Civilized Tribes to copy, exhibit, or use such rolls, or a copy thereof, for any purpose necessary or required by law. (34 Stat. 340.)

Section 265. Enrollment Mississippi Choctaw full bloods.

No distinction shall be made in the enrollment of full-blood Mississippi Choctaws who have been identified by the United States Commission to the Five Civilized Tribes, and who had removed to the Indian Territory prior to March fourth, nineteen hundred and six, and who shall furnish proof thereof. (34 Stat. 341.)

Section 266. Closing rolls.

That section two of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby amended by striking out thereof the words, "*Provided further*, that nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing applications has been fixed by agreement between said tribe and the United States: *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nations whose cases are now pending in the Supreme Court of the United States". And insert in said Act in lieu of the matter repealed, the following, "*Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors, the children of Indians by blood, or of freedmen members of the said tribes, or for Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment. (34 Stat. 341, 342.)

Section 267. Removal individual restrictions.

That to enable the Red River Bridge Company, of Denison, Texas, to acquire land necessary to the proper conduct and operation of its property, Wyatt S. Hawkins, an intermarried citizen of the Chickasaw Nation, is hereby authorized to sell and convey the whole of any part of the homestead allotted to him as such intermarried citizen, and all restriction on the alienation of such homestead imposed by any existing law is hereby removed.

Section 268. Removal individual restrictions.

That all restrictions as to the sale, incumbrance or taxation of the lands heretofore allotted to William P. Ross, of Tahlequah, Maud W. Ross, Edward G. Ross, Mrs. Josephine Rider, William P. Ross of Bartlesville, Nevermore Trainer, Annie C. Bennett, Nathan F. Adams, Annie Potts, and Sam Spade, Famous Dew numbered twenty-eight

thousand five hundred, Alexander Proctor numbered twenty-eight thousand three hundred and thirty-two, Lizzie Sunday numbered fifteen hundred and twenty-two, Sarah Ooyusuttah numbered twenty thousand three hundred and ninety-nine, Betsy Galcatcher numbered fifteen thousand two hundred and eleven, George W. Bark, numbered eighteen thousand five hundred and sixty-five, Nellie Hicks numbered sixty-one hundred and seventy-nine, Charley Ellis numbered twenty-nine thousand five hundred and twenty-five, Tillman England numbered eighteen thousand and three, Taylor Soldier numbered sixty-three hundred and fifteen, Carry Downing numbered eighteen thousand one hundred and sixty-eight, Tyler Tilden numbered sixty-four hundred and forty-one, Lewis Drager numbered twenty seven thousand four hundred and seven, Joshua Young numbered sixty-two hundred and ninety-one, all citizens of the Cherokee Nation, Indian Territory, and duly enrolled as such, be, and the same are hereby, removed.

That the restrictions upon the alienation of the homestead of Benjamin Marshall, a Creek Indian, it being the southeast quarter of the southwest quarter of section twenty-eight, township sixteen north, and range seventeen east of the Indian base meridian, in Indian Territory, containing forty acres, be, and the same are hereby, removed. That all restrictions upon the sale of the northeast quarter of the southwest quarter of section fifteen, township ten, range eleven east, in the Creek Nation, the homestead of Martha Lowe, be and hereby are removed: *Provided*, That the same be sold under the direction of the Secretary of the Interior and upon the condition that said Secretary shall retain the proceeds of such sale and disburse the same in such amounts and at such times as he deems advisable. That all restrictions upon the alienation of the west half of the southeast quarter of the southeast quarter, and the southeast quarter of the southeast quarter of the southeast quarter of section twelve, township seven, north of range eight, formerly owned by Manda Proctor, a deceased Creek Indian, are hereby removed. That all restrictions upon the alienation or leasing of lands held by Sallie Carey, Bell Leverett (nee Murrell), Maria Williams (Nee Jamison), Andrew Wiley and Susie Wiley, mixed blood Creek Indians, and William N. Taliaferro and Mary Estella Taliaferro (his wife), Choctaw allottees, in the Indian Territory, be and the same hereby are removed.

That the restrictions upon the alienation of the homestead of John A. Jacobs, a Creek Indian, it being the southwest quarter of the southwest quarter of section eighteen, township seven north, and range nine east of the Indian base meridian, in Indian Territory, containing forty acres, be, and the same are hereby removed. (34 Stat. 345-6.)

Section 269. Removal of restrictions for townsite purposes.

That for the purpose of allowing any Indian allottee to sell for townsite purposes any portion of the lands allotted to him the Secretary of the Interior may, by order, remove restrictions upon the alienation of such lands and issue fee-simple patents therefor under such rules and regulations as he may prescribe:

That upon the recommendation of the Commissioner to the Five Civilized Tribes and with the approval of the Secretary of the Interior any allottee in the Indian Territory may be permitted to survey and plat at his own expense for townsite purposes his allotment when the same is located along the line of any railroad where stations are located. (34 Stat. 373).

CHAPTER LIV.

SEMINOLE TOWNSITE ACT.

AN ACT to provide for the appointment of town-site commissioners and the location of a town in the Seminole Nation.

Section 270. Commissioners appointed.

Be it enacted by the general council of the Seminole Nation: SECTION 1. That A. J. Brown, Thomas McGeisey, Thomas Factor, W. L. Joseph, and Dorsey Fife be, and are hereby, appointed as town-site commissioners for the Seminole Nation, and their term of office shall continue for four years and until their successors are appointed by the general council and qualified.

The said commissioners shall each execute a bond in the sum of five thousand dollars, to be approved by the general council, for the faithful performance of their duty, and they, or either of them, may be impeached and removed from office, and fined or otherwise punished by the general council, for malfeasance or improper conduct while in office.

Before entering upon their duties the said commissioners shall elect one of their number as president and one as secretary. They shall keep a record of all their doings and transactions and make a report of the same to the general council once in each year.

Section 271. Authority of Commission.

[2]. That said commission shall select a suitable tract or tracts of land in the Seminole Nation, not exceeding six hundred and forty acres, for a town, to be known and designated as Wewoka. And when selected the said commissioners shall cause the same to be surveyed and divided into lots, blocks, streets, and alleys of suitable width and size for residence and building purposes, and have the same numbered and platted according to the usual plan adopted by the United States for laying out and establishing town-sites.

There shall also be set apart one block for public buildings and two additional blocks or squares, properly located, for public parks.

Section 272. Compensation to occupants.

[3]. Should any or all of the lands selected by said commission for the purposes herein mentioned be owned, occupied, or claimed by any member of the Seminole Nation for business, agricultural, or grazing purposes, or as a home, or for any other legitimate purpose, then and in that event the said commission shall, before entering upon such land for the purpose of using them as a townsite, make and enter into a contract or agreement with such person or persons for the relinquishment of their right and title to the same, and in consideration thereof the said commissioners shall have the right, and they are hereby empowered, to grant and relinquish to such person or persons owning, occupying, or claiming said lands an interest in said town equivalent to one-fourth the entire number of acres which they may own, occupy, or claim: *Provided*, That such person or persons shall have the right and privilege of selecting in said town the said one-fourth interest, subject to the approval of the said commission, which selection shall include any buildings that may at the time belong to such person or persons.

Section 273. Commissioners authorized to sell or lease lots.

[4]. That a description of the tracts of land which may be selected by said commissioners for the purpose aforesaid, according to the United States survey of the same, shall be reported to the national council, with a plat of the town, showing the survey of the same into lots, blocks, streets, and alleys, and also the blocks or squares for parks and public buildings, whereupon the president and secretary of the said national council, with the approval of the principal chief of the Seminole Nation, shall convey the tracts of land so selected and reported in trust to the said commissioners, who shall have the general management of the said town.

The said commission shall have power to sell or lease the said town lots upon such terms and conditions and for such considerations as they may deem proper, and to execute leases as in their judgment may be for the best interests of the said town, the Seminole Nation, and people: *Provided*, That no sale shall be made to noncitizens, whether Indians by blood or otherwise, until the tribal organization as such shall cease to exist: *And provided*, That no transfer of the title of lots shall be made to any person or persons, except upon the condition that a building or buildings, or other valuable improvements, shall be erected

thereon within six months from date of lease or purchase of such lot or lots: *Provided*, That said commissioners may in their discretion, for good cause shown, extend the time for the completion of such building, buildings, or improvements.

Section 274. Commissioners required to keep record.

[5]. That said commission shall keep a record of all lots and blocks sold, leased, or otherwise disposed of by them, and they shall pay over to the treasurer of the Seminole Nation once every six months the net proceeds of sales of the aforesaid three-fourths interest in said town: *Provided*, That the aforesaid one-fourth interest belonging to person or persons who may be entitled to the same as aforesaid shall be conveyed to such person or persons aforesaid, and said person or persons shall have the exclusive management and control of the same, and may lease, sell, or convey the same upon the terms and conditions as hereinbefore provided for the disposition of other lots and blocks. The said commissioners shall be allowed pay for their services in the management of the town, and on sales of lots five per centum of all moneys that may be received on account of such sales or leases.

Section 275. Appointment of officers authorized.

[6]. That said commissioners are hereby authorized to appoint a city marshal for the said town of Wewoka, who shall have the power to arrest all offenders and disturbers of the peace and protect the lives and property of the people. The said marshal shall execute a bond in such sum as said commission may prescribe for the faithful performance of his duty, and he may be removed from office by said commission for good and sufficient cause. The said commission shall also have the right to appoint a city attorney and police judge for such time and upon such terms and conditions as they may prescribe. They shall also have the power, when the population of said town is two hundred or more, to organize a city government for the said town and provide for the election of a mayor and city council in such manner and upon such terms and conditions as they may prescribe, and they shall fix the salaries or designate the fees to be paid to each of the city officers, subject to the approval of the national council. The said commission shall have the right to levy and collect taxes in said town for the purpose of maintaining a city government and making such improvements as

they may deem necessary: *Provided*, That no taxes shall be levied or collected on the lots in said town during the existence of the Indian government.

Section 276. Wewoka made capital of Seminole Nation.

[7]. That the town of Wewoka shall, and is hereby, declared to be the capital and seat of government of the Seminole Nation, and shall remain as such so long as the present tribal organization exists.

Section 277. Townsite act to take effect upon its passage.

[8]. This act shall take effect and be in force from and after its passage.

I hereby certify that the foregoing act was duly considered and passed by the general council of the Seminole Nation at Wewoka, I. T., on this 23d day of April, 1897.

Attest:

T. S. McGEISEY,
Secretary.

NUTHCUP HARJO,
President of the Council.

Approved April 23, 1897.

JOHN F. BROWN,
Principal Chief.

(See Sec. 282.)

**JOINT RESOLUTION MARCH 2, 1906, EXTENDING
TRIBAL GOVERNMENTS.**

Section 278. Joint resolution extending tribal governments.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Approved March 2, 1906. (34 Stat. 822).

CHAPTER LV.

AGREEMENT BETWEEN THE COMMISSION TO THE FIVE CIVILIZED TRIBES AND THE SEMINOLE COMMISSION

(30 STAT. 567).

Section 279. Preamble to Seminole Agreement.

This agreement by and between the Government of the United States, of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Daws, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the government of the Seminole Nation in Indian Territory, of the second part entered into on behalf of said government by its commission, duly appointed and authorized thereunto, viz.: John F. Brown, Okchan Harjo, William Cully, K. N. Kinkehee, Thomas West, and Thomas Factor;

Witnesseth that in consideration of the mutual undertakings herein contained it is agreed as follows:

Section 280. Allotment, Seminole lands—restrictions upon alienation.

All lands belonging to the Seminole Tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States court at Wewoka.

Section 281. Leases—agricultural and mineral.

No lease of any coal, mineral, coal oil or natural gas within said nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

Section 282. Former Townsite Act of Seminole Council ratified—patents to issue when.

The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the general council of the Seminole Nation, approved April 23, 1897, relative thereto; and on extinguishment of the tribal government deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior.

Section 283. Appropriation for Seminoles.

Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after ex-

tinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

Section 284. Reservation for church purposes.

There shall also be excepted from allotment one-half acre for the use and occupancy of each of twenty-four churches, including those already existing and such others as may hereafter be established in the Seminole country, by and with consent of the general council of the nation; but should any part of same at any time cease to be used for church purposes, such part shall at once revert to the Seminole people and be added to the lands set apart for the use of said district schools.

One acre in each township shall be excepted from allotment, and the same may be purchased by the United States, upon which to establish schools for the education of children of noncitizens, when deemed expedient.

Section 285. Patents to issue to Seminole Allottees when tribal government ceases.

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as a relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guaranty by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity.

Section 286. Final disposition of Seminole affairs.

All moneys belonging to the Seminoles remaining after equalizing the value of allottments as herein pro-

vided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The loyal Seminole claim shall be submitted to the United States Senate, which shall make final determination of same, and, if sustained, shall provide for payment thereof within two years from date hereof.

There shall hereafter be held at the town of Wewoka, the present capital of the Seminole Nation, regular terms of the United States court as at other points in the judicial district of which the Seminole Nation is a part.

The United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.

This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith.

Section 287. Jurisdiction conferred upon United States court.

The United States courts now existing, or that may hereafter be created, in Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles; and to try all persons charged with homicide, embezzlement, bribery, and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime; and any citizen or officer of said nation charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, and the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.

Section 288. General provisions.

When this agreement is ratified by the Seminole Nation and the United States, the same shall serve to repeal the provisions of the act of Congress approved June 7, 1897,

in any manner affecting the proceedings of the general council of the Seminole Nation.

It being known that the Seminole Reservation is insufficient for allotments for the use of the Seminole people, upon which they, as citizens, holding in severalty, may reasonably and adequately maintain their families, the United States will make effort to purchase from the Creek Nation, at one dollar and twenty-five cents per acre, two hundred thousand acres of land, immediately adjoining the eastern boundary of the Seminole reservation and lying between the North Fork and South Fork of the Canadian River, in trust for, and to be conveyed by proper patent by the United States to, the Seminole Indians, upon said sum of one dollar and twenty-five cents per acre being reimbursed to the United States by said Seminole Indians; the same to be allotted as herein provided for lands now owned by the Seminoles.

This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation.

In witness whereof, the said commissioners have hereunto affixed their names at Muskogee, Indian Territory, this sixteenth day of December, A. D. 1897.

HENRY L. DAWES,
TAMS BIXBY,
FRANK C. ARMSTRONG,
ARCHIBALD S. MCKENNON,
THOMAS B. NEEDLES,

Commission to the Five Civilized Tribes.

ALLISON L. AYLESWORTH, *Secretary.*

JOHN F. BROWN,
OKCHAN HARJO,
WILLIAM CULLY,
K. N. KINKEHEE,
THOMAS WEST,
THOMAS FACTOR,

A. J. BROWN, *Secretary.*

Seminole Commission.

SEMINOLE AGREEMENT OF OCTOBER 7, 1899
[31 STAT. L., 250.]

Section 289. Preamble to supplemental Seminole agreement.

"This agreement by and between the Government of the United States, of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the

Seminole tribe of Indians, in Indian Territory, of the second part, entered into in behalf of said tribe by John F. Brown and K. N. Kinkehee, commissioners duly appointed and authorized thereunto, witnesseth:

Section 290. Tribal membership rolls.

First. That the Commission to the Five Civilized Tribes, in making the rolls of Seminole citizens, pursuant to the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred and ninety-nine, and the names of all Seminole citizens then living; and the rolls so made, when approved by the Secretary of the Interior, as provided by said act of Congress, shall constitute the final rolls of Seminole citizens, upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made, and to no other persons.

Section 291. Allotments to certain deceased members.

Second. If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas, and be allotted and distributed to them accordingly: *Provided*, That in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father.

Section 292. Ratification of agreement.

Third. This agreement to be ratified by the general council of the Seminole Nation and by the Congress of the United States.

In witness whereof the said commissioners hereunto affix their names, at Muskogee, Indian Territory, this seventh day of October, eighteen hundred and ninety-nine.

HENRY L. DAWES,

TAMS BIXBY,

ARCHIBALD S. MCKENNON,

THOMAS B. NEEDLES,

JOHN F. BROWN,

K. N. KINKEHEE,

Seminole Commissioners.

Commission to the Five Civilized Tribes.

CHAPTER LVI.

ACT JUNE 28, 1898, INCLUDING ATÓKA AGREEMENT (30 STAT. 495).

AN ACT for the protection of the people of the Indian Territory, and for other purposes.

Section 293. Certain crimes to be punished.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all criminal prosecutions in the Indian Territory against officials for embezzlement, bribery, and embracery the word "officer," when the same appears in the criminal laws heretofore extended over and put in force in said Territory, shall include all officers of the several tribes or nations of Indians in said Territory.

Section 294. Authorizing making Nations parties to suits.

[2]. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

Section 295. Jurisdiction where tribal membership denied.

[3]. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the Commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same: *Provided always,* That any person being a noncitizen

in possession of lands, holding the possession thereof under an agreement, lease, or improvement contract with either of said nations or tribes, or any citizen thereof, executed prior to January first, eighteen hundred and ninety-eight, may, as to lands not exceeding in amount one hundred and sixty acres, in defense of any action for the possession of said lands show that he is and has been in peaceable possession of such lands, and that he has while in such possession made lasting and valuable improvements thereon, and that he has not enjoyed the possession thereof a sufficient length of time to compensate him for such improvements. Thereupon the court or jury trying said cause shall determine the fair and reasonable value of such improvements and the fair and reasonable rental value of such lands for the time the same shall have been occupied by such person, and if the improvements exceed in value the amount of rents with which such persons should be charged the court, in its judgment, shall specify such time as will, in the opinion of the court, compensate such person for the balance due, and award him possession for such time unless the amount be paid by claimant within such reasonable time as the court shall specify. If the finding be that the amount of rents exceed the value of the improvements, judgment shall be rendered against the defendant for such sum, for which execution may issue.

Section 296. Authorizing sale of improvements where citizenship denied.

[4]. That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians, claiming rights of citizenship, whose claims have been decided adversely under the act of Congress approved June tenth, eighteen hundred and ninety-six, shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight; and may, prior to that time, sell or dispose of the same to any member of the tribe owning the land who desires to take the same in his allotment: *Provided*, That this section shall not apply to improvements which have been appraised and paid for, or payment tendered by the Cherokee Nation under the agreement with the United States approved by Congress March third, eighteen hundred and ninety-three.

Section 297. Making tribe party to suit.

[5]. That before any action by any tribe or person shall be commenced under section three of this act it shall

be the duty of the party bringing the same to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least thirty days before commencing the action by leaving a written copy with the defendant, or, if he can not be found, by leaving the same at his last known place of residence or business with any person occupying the premises over the age of twelve years, or, if his residence or business address can not be ascertained, by leaving the same with any person over the age of twelve years upon the premises sought to be recovered and described in said notice; and if there be no person with whom said notice can be left, then by posting same on the premises.

Section 298. Making tribe party to suit.

[6]. That the summons shall not issue in such action until the chief or governor of the tribe, or person or persons bringing suit in his own behalf, shall have filed a sworn complaint, on behalf of the tribe or himself, with the court, which shall, as near as practicable, describe the premises so detained, and shall set forth a detention without the consent of the person bringing said suit or the tribe, by one whose membership is denied by it: *Provided*, That if the chief or governor refuse or fail to bring suit in behalf of the tribe then any member of the tribe may make complaint and bring said suit.

Section 299. Regulating continuances.

[7]. That the court in granting a continuance of any case, particularly under section three, may, in its discretion, require the party applying therefor to give an undertaking to the adverse party, with good and sufficient securities, to be approved by the judge of the court, conditioned for the payment of all damages and costs and defraying the rent which may accrue if judgment be rendered against him.

Section 300. Restitution—judgments for.

[8]. That when a judgment for restitution shall be entered by the court the clerk shall, at the request of the plaintiff or his attorney, issue a writ of execution thereon, which shall command the proper officer of the court to cause the defendant or defendants to be forthwith removed and ejected from the premises and the plaintiff given complete and undisturbed possession of the same. The writ shall also command the said officer to levy upon the property of the defendant or defendants subject to execution, and also collect therefrom the costs of

the action and all accruing costs in the service of the writ. Said writ shall be executed within thirty days.

Section 301. Police jurisdiction conferred.

[9]. That the jurisdiction of the court and municipal authority of the city of Fort Smith for police purposes in the State of Arkansas is hereby extended over all that strip of land in the Indian Territory lying and being situate between the corporate limits of the said city of Fort Smith and the Arkansas and Poteau rivers, and extending up the said Poteau River to the mouth of Mill Creek; and all the laws and ordinances for the preservation of the peace and health of said city, as far as the same are applicable, are hereby put in force therein: *Provided*, That no charge or tax shall ever be made or levied by said city against said land or the tribe or nation to whom it belongs.

Section 302. Limitation on right to bring certain actions.

[10]. That all actions for restitution of possession of real property under this act must be commenced by the service of a summons within two years after the passage of this act, where the wrongful detention or possession began prior to the date of its passage; and all actions which shall be commenced hereafter, based upon wrongful detention or possession committed since the passage of this act must be commenced within two years after the cause of action accrued. And nothing in this act shall take away the right to maintain an action for unlawful and forcible entry and detainer given by the act of Congress passed May second, eighteen hundred and ninety. (Twenty-sixth United States Statutes, page ninety-five.)

Section 303. Allotment—when.

[11]. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are

reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; and all town sites shall also be reserved to the several tribes, and shall be set apart by the Commission heretofore mentioned as incapable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual and necessary use, and no more, not to exceed five acres for each school and one acre for each church and each parsonage, and for such new schools as may be needed; also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of Congress: *Provided further*, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands; that all persons known as intruders who have been paid for their improvements under existing laws and have not surrendered possession thereof who may be found under the provisions of this act to be entitled to citizenship shall, within ninety days thereafter, refund the amount so paid them, with six per centum interest, to the tribe entitled thereto; and upon their failure so to do said amount shall become a lien upon all improvements owned by such person in such Territory, and may be enforced by such tribe; and unless such person makes such restitution no allotments shall be made to him: *Provided further*, That the lands allotted shall be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held: *Provided further*, That all towns and cities heretofore incor-

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States court at Wewoka.

Section 281. Leases—agricultural and mineral.

No lease of any coal, mineral, coal oil or natural gas within said nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

Section 282. Former Townsite Act of Seminole Council ratified—patents to issue when.

The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the general council of the Seminole Nation, approved April 23, 1897, relative thereto; and on extinguishment of the tribal government deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior.

Section 283. Appropriation for Seminoles.

Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after ex-

tinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

Section 284. Reservation for church purposes.

There shall also be excepted from allotment one-half acre for the use and occupancy of each of twenty-four churches, including those already existing and such others as may hereafter be established in the Seminole country, by and with consent of the general council of the nation; but should any part of same at any time cease to be used for church purposes, such part shall at once revert to the Seminole people and be added to the lands set apart for the use of said district schools.

One acre in each township shall be excepted from allotment, and the same may be purchased by the United States, upon which to establish schools for the education of children of noncitizens, when deemed expedient.

Section 285. Patents to issue to Seminole Allottees when tribal government ceases.

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as a relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guaranty by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity.

Section 286. Final disposition of Seminole affairs.

All moneys belonging to the Seminoles remaining after equalizing the value of allottments as herein pro-

or the clerk of the county court or the Secretary of State, necessary for the incorporation of any city or town, as provided in Mansfield's Digest, and such city or town government, when so authorized and organized, shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas. All male inhabitants of such cities and towns over the age of twenty-one years, who are citizens of the United States or of either of said tribes, who have resided therein more than six months next before any election held under this act, shall be qualified voters at such election. That mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory, and may charge, collect, and retain the same fees as such commissioners now collect and account for to the United States; and the marshal or other executive officer of such city or town may execute all processes issued in the exercise of the jurisdiction hereby conferred, and charge and collect the same fees for similar services, as are allowed to constables under the laws now in force in said Territory.

All elections shall be conducted under the provisions of chapter fifty-six of said digest, entitled "Elections," so far as the same may be applicable; and all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein. Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subject to taxation. And the councils of such cities and towns, for the support of the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled "Revenue," and for such purposes may also impose a tax upon occupations and privileges.

Such councils may also establish and maintain free schools in such cities and towns, under the provisions of sections sixty-two hundred and fifty-eight to sixty-two hundred and seventy-six, inclusive, of said digest, and may exercise all the powers conferred upon special school districts in cities and towns in the State of Arkansas by the laws of said State when the same are not in conflict with the provisions of this act.

For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: *Provided*, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale, therein: *Provided further*, That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same.

Section 307. Townsite Commissions.

[15]. That there shall be a Commission in each town for each one of the Chickasaw, Choctaw, Creek and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property, other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or the town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.

Said Commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, conforming to the existing survey so far as may be, with proper and necessary streets, alleys, and public grounds, including parks and cemeteries, giving to each town such territory as may be required for its present needs and reason-

able prospective growth; and shall prepare correct plats thereof, and file one with the Secretary of the Interior, one with the clerk of the United States court, one with the authorities of the tribe, and one with the town authorities. And all town lots shall be appraised by said Commission at their true value, excluding improvements, and separate appraisements shall be made of all improvements thereon, and no such appraisement shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot, said Secretary may fix the value thereof.

The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; ten percentum within two months and fifteen percentum more within six months after notice of appraisement, and the remainder in three equal annual installments thereafter, depositing with the Secretary of the Interior one receipt for each payment, and one with the authorities of the tribe, and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; and when the purchaser thereof has complied with the requirements herein for the purchase of improved lots he may, by petition, apply to the United States court within whose jurisdiction the town is located for condemnation and appraisement of such improvements, and petitioner shall, after judgment, deposit the value so fixed with the clerk of the court; and thereupon the defendant shall be required to accept same in full payment for his improvements or remove same from the lot within such time as may be fixed by the court.

All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said Commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots.

The inhabitants of any town may, within one year after the completion of the survey thereof, make such deposit of ten dol-

lars per acre for parks, cemeteries, and other public grounds laid out by said Commission with like effect as for improved lots; and such parks and public grounds shall not be used for any purpose until such deposits are made.

The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe; and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe: *Provided, however,* That in those town sites designated and laid out under the provisions of this act where coal leases are now being operated and coal is being mined there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto a sufficient amount of land, to be determined by the appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines and a sufficient amount for all buildings and machinery for mining purposes: *And provided further,* That when the lessees shall cease to operate said mines, then, and in that event, the lots of land so reserved shall be disposed of as provided for in this act.

Section 308. Excessive holdings.

[16]. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong: *Provided,* That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents there-

on until allotment has been made to him: *Provided further*, That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment.

Section 309. Excessive holder guilty of misdemeanor.

[17]. That it shall be unlawful for any citizen of any one of said tribes to inclose or in any manner, by himself or through another, directly or indirectly, to hold possession of any greater amount of lands or other property belonging to any such nation or tribe than that which would be his approximate share of the lands belonging to such nation or tribe and that of his wife and his minor children as per allotment herein provided; and any person found in such possession of lands or other property in excess of his share and that of his family, as aforesaid, or having the same in any manner inclosed, at the expiration of nine months after the passage of this act, shall be deemed guilty of a misdemeanor.

Section 310. Excessive holdings—punishment for.

[18]. That any person convicted of violating any of the provisions of sections sixteen and seventeen of this act shall be deemed guilty of a misdemeanor and punished by a fine of not less than one hundred dollars, and shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs), and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. And the United States district attorneys in said Territory are required to see that the provisions of said sections are strictly enforced and they shall at once proceed to dispossess all persons of such excessive holding of lands and to prosecute them for so unlawfully holding the same.

Section 311. Payments to be made direct to Indians.

[19]. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

Section 312. Commission authorized to employ help.

[20]. That the Commission hereinbefore named shall have authority to employ, with approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of all duties herein imposed, including competent surveyors to make allotments, and to do any other needed work, and the Secretary of the Interior may detail competent clerks to aid them in the performance of their duties.

Section 313. Citizenship rolls—direction as to making.

[21]. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotments and distributions, and not elsewhere.

No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or priv-

ileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall willfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.

Section 314. Allotments to members of another tribe.

[22]. That where members of one tribe, under intercourse laws, usages, or customs, have made homes within the limits and on the lands of another tribe they may retain and take allotment, embracing same under such agreement as may be made between such tribes respecting such settlers; but if no such agreement be made the improvements so made shall be

appraised, and the value thereof, including all damages incurred by such settler incident to enforced removal, shall be paid to him immediately upon removal, out of any funds belonging to the tribe, or such settler, if he so desire, may make private sale of his improvements to any citizen of the tribe owning the lands: *Provided*, That he shall not be paid for improvements made on lands in excess of that to which he, his wife, and minor children are entitled to under this act.

Section 315. Agricultural leases—certain declared void.

[23]. That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof shall be absolutely void, and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred; but this shall not prevent individuals from leasing their allotments when made to them as provided in this act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made.

Section 316. Directing payment of moneys.

[24]. That all moneys paid into the United States Treasury at Saint Louis, Missouri, under provisions of this act shall be placed to the credit of the tribe to which they belong; and the assistant United States treasurer shall give triplicate receipts therefor to the depositor.

Section 317. Appropriation.

[25] That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the Commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand six hundred acres purchased by the Delaware tribe of Indians from the Cherokee Nation under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under

their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States.

Section 318. Laws of tribes not to be enforced.

[26]. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.

Section 319. Indian inspector located in Indian Territory.

[27]. That the Secretary of the Interior is authorized to locate one Indian inspector in Indian Territory, who may, under his authority and direction, perform any duties required of the Secretary of the Interior by law, relating to affairs therein.

Section 320. Tribal courts abolished.

[28]. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

Section 321. Submission of Atoka Agreement.

[29]. That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes

appraised, and the value thereof, including all damages incurred by such settler incident to enforced removal, shall be paid to him immediately upon removal, out of any funds belonging to the tribe, or such settler, if he so desire, may make private sale of his improvements to any citizen of the tribe owning the lands: *Provided*, That he shall not be paid for improvements made on lands in excess of that to which he, his wife, and minor children are entitled to under this act.

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their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States.

Section 318. Laws of tribes not to be enforced.

[26]. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.

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Section 320. Tribal courts abolished.

[28]. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

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[29]. That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes

are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not: *Provided*, That no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election: *Provided further*, That the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretaries of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the Commission to the Five Civilized Tribes, to be designated by the chairman of said Commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this act, which said amended agreement is as follows:

This agreement, by and between the Government of the United States, of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Cabaniss, and Alexander B. Montgomery, duly appointed and authorized thereunto, and the governments of the Choctaw and Chickasaw tribes or nations of Indians in the Indian Territory, respectively, of the second part, entered into in behalf of such Choctaw and Chickasaw governments, duly appointed and authorized thereunto, viz, Green McCurtain, J. S. Standley, N. B. Ainsworth, Ben Hampton, Wesley Anderson, Amos Henry, D. C. Garland, and A. S. Williams, in behalf of the Choctaw Tribe or Nation, and R. M. Harris, I. O. Lewis, Holmes Colbert, P. S. Mosely, M. V.

Cheadle, R. L. Murray, William Perry, A. H. Colbert, and R. L. Boyd, in behalf of the Chickasaw Tribe or Nation.

ALLOTMENT OF LANDS.

Witnesseth, That in consideration of the mutual undertakings, herein contained, it is agreed as follows:

Section 322. Allotment to Choctaw and Chickasaws.

[29]. That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

That all the lands set apart for town sites, and the strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up said river to the mouth of Mill Creek; and six hundred and forty acres each, to include the buildings now occupied by the Jones Academy, Tushkahoma Female Seminary, Wheelock Orphan Seminary, and Armstrong Orphan Academy, and ten acres for the capitol building of the Choctaw Nation; one hundred and sixty acres each, immediately contiguous to and including the buildings known as Bloomfield Academy, Lebanon Orphan Home, Harley Institute, Rock Academy, and Collins Institute, and five acres for the capitol building in the Chickasaw Nation, and the use of one acre of land for each church house now erected outside of the towns, and eighty acres of land each for J. S. Murrow, H. R. Schermerhorn, and the widow of R. S. Bell, who have been laboring as missionaries in the Choctaw and Chickasaw nations since the year eighteen hundred and sixty-six, with the same conditions and limitations as apply to lands allotted to the members of the Choctaw and Chickasaw nations, and to be located on lands not occupied by a Choctaw or a Chickasaw, and a reasonable amount of land, to be determined by the town-site commission, to include all courthouses and jails and other public buildings not hereinbefore provided for, shall be exempted from division.

Section 323. Coal and asphalt reservation.

[29]. And all coal and asphalt in or under the lands allotted and reserved from allotment shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freedmen: *Provided*, That where any coal or

asphalt is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin. That in order to such equal division, the lands of the Choctaws and Chickasaws shall be graded and appraised so as to give to each member, so far as possible, an equal value of the land: *Provided further*, That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress.

Section 324. Choctaw and Chickasaw freedmen.

[29]. That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribes so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

Section 325. Choctaw and Chickasaw freedmen, allotment to.

[29]. That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

Section 326. Appraisement for allotment purposes.

[29]. That in the appraisement of the lands to be allotted the Choctaw and Chickasaw tribes shall each have a representative, to be appointed by their respective executives, to co-operate with the Commission to the Five Civilized Tribes, or any one making appraisements under the direction of the Secretary of the Interior in grading and appraising the lands preparatory to allotment. And the land shall be valued in the appraisement as if in its original condition, excluding the improvements thereon.

That the appraisement and allotment shall be made under the direction of the Secretary of the Interior, and shall begin as soon as the progress of the surveys, now being made by the United States Government, will admit.

Section 327. Preference right to select allotment.

[29]. That each member of the Choctaw and Chickasaw tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the right to take his allotment on land, the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment. In the case of minor children, allotments shall be selected for them by their father, mother, guardian, or the administrator having charge of their estate, preference being given in the order named, and shall not be sold during his minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them, and due care taken that all persons entitled thereto have allotments made to them.

Section 328. Alienation of allotted lands.

[29]. All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

Section 329. Contracts, violation of agreement.

[29]. That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void. No allottee shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of

the United States court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder. And no such lease or any sale shall be valid as against the allottee unless providing to him a reasonable compensation for the lands sold or leased.

Section 330: Jurisdiction conferred upon Commission.

[29]. That all controversies arising between the members of said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.

That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee.

That the United States shall survey and definitely mark and locate the ninety-eighth (98th) meridian of west longitude between Red and Canadian rivers before allotment of the lands herein provided for shall begin.

MEMBERS' TITLES TO LANDS.

Section 331. Title to allotted lands.

[29]. That, as soon as practicable after the completion of said allotments, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment.

That the United States shall provide by law for proper records of land titles in the territory occupied by the Choctaw and Chickasaw tribes.

RAILROADS.

Section 332. Railroads.

[29]. The rights of way for railroad through the Choctaw and Chickasaw nations to be surveyed and set apart and platted to conform to the respective acts of Congress granting the same in cases where said rights of way are defined by such acts of Congress, but in cases where the acts of Congress do not define the same then Congress is memorialized to definitely fix the width of said rights of way for station grounds and between stations, so that railroads now constructed through said nations shall have, as near as possible, uniform rights of way; and Congress is also requested to fix uniform rates of fare and freight for all railroads through the Choctaw and Chickasaw nations; branch railroads now constructed and not built according to acts of Congress to pay the same rates for rights of way and station grounds as main lines.

TOWNSITES.

Section 333. Townsites.

[29]. It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the President of the United States. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States district court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commis-

sion provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the Treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to act with said commission, who is not interested in town lots, who shall act with them to determine said value.

If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of said appraised value of the lot, and shall pay the sixty-two and one-half per cent of said appraised value into the United States Treasury, under regulations to be established by the Secretary of the Interior, in four installments, as hereinbefore provided. The commission shall have the right to reject any bid on such lot which they consider below its value.

All lots not so appraised shall be sold from time to time at public auction (after proper advertisement) by the commission for the nation in which the town is located, as may seem for the best interest of the nations and the proper development of each town, the purchase price to be paid in four installments as hereinbefore provided for improved lots. The commission shall have the right to reject any bid for such lots which they consider below its value.

All the payments herein provided for shall be made under the direction of the Secretary of the Interior into the United States Treasury, a failure of sixty days to make any one payment to be a forfeiture of all payments made and all rights under the contract: *Provided*, That the purchaser of any lot shall have the option of paying the entire price of the lot before the same is due.

No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation.

The money paid into the United States Treasury for the sale of all town lots shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted), and at the end of one year from the ratification of this agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof.

That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the laws of the United States in force in said Territory, and all persons in such towns shall be subject to said laws, and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.

Section 334. Cemeteries, churches, etc.

[29]. That said commission shall be authorized to locate, within a suitable distance from each town site, not to exceed five acres to be used as a cemetery, and when any town has paid into the United States Treasury, to be part of the fund arising from the sale of town lots, ten dollars per acre therefor, such town shall be entitled to a patent for the same as herein provided for titles to allottees, and shall dispose of same at reasonable prices in suitable lots for burial purposes, the proceeds derived from such sales to be applied by the town government to the proper improvement and care of said cemetery.

That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading,

appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided.

That the land adjacent to Fort Smith and lands for court-houses, jails, and other public purposes, excepted from allotment shall be disposed of in the same manner and for the same purposes as provided for town lots herein, but not till the Choctaw and Chickasaw councils shall direct such disposition to be made thereof, and said land adjacent thereto shall be placed under the jurisdiction of the city of Fort Smith, Arkansas, for police purposes.

There shall be set apart and exempted from appraisement and sale in the towns, lots upon which churches and parsonages are now built and occupied, not to exceed fifty feet front and one hundred feet deep for each church or parsonage: *Provided*, That such lots shall only be used for churches and parsonages, and when they cease to be used shall revert to the members of the tribes to be disposed of as other town lots: *Provided further*, That these lots may be sold by the churches for which they are set apart if the purchase money therefor is invested in other lot or lots in the same town, to be used for the same purpose and with the same conditions and limitations.

Section 335. Coal and asphalt lands reserved.

[29]. It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes. Such coal and asphalt mines as are now in operation, and all others which may hereafter be leased and operated, shall be under the supervision and control of two trustees, who shall be appointed by the President of the United States, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood, whose term shall be for two years; after which the term of appointees shall be four years. Said trustees, or either of them, may, at any time, be re-

moved by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties, under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their respective nations, each of whom shall make full report of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary.

All coal and asphalt mines in the two nations, whether now developed or to be hereafter developed, shall be operated, and the royalties therefrom paid into the Treasury of the United States, and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior.

All contracts made by the national agents of the Choctaw and Chickasaw nations for operating coal and asphalt, with any person or corporation, which were, on April twenty-third, eighteen hundred and ninety-seven, being operated in good faith are hereby ratified and confirmed, and the lessee shall have the right to renew the same when they expire subject to all the provisions of this act.

All agreements heretofore made by any person or corporation with any member or members of the Choctaw or Chickasaw nations, the object of which was to obtain such member or members' permission to operate coal or asphalt, are hereby declared void: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interests shall continue unimpaired hereby and shall be assured by new leases from such trustees of coal or asphalt claims described therein, by application to the trustees within six months after the ratification of this agreement, subject, however, to payment of advance royalties herein provided for.

All leases under this agreement shall include the coal or asphaltum, or other mineral, as the case may be, in or under nine hundred and sixty acres, which shall be in a square as nearly as possible, and shall be for thirty years. The royalty on coal shall be fifteen cents per ton of two thousand pounds on all coal mined, payable on the 25th day of the month next succeeding that in which it is mined. Royalty on asphalt shall be sixty cents per ton, payable same as coal: *Provided*, That the Secretary of the Interior may reduce or advance royalties on coal and asphalt when he deems it for the best interests of the Choctaws and

Chickasaws to do so. No royalties shall be paid except into the United States Treasury as herein provided.

All lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made; and shall be a credit as royalty when each said mine is developed and operated, and its production is in excess of such guaranteed annual advance payments, and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped: *Provided, however,* That should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall become and be the money and property of the Choctaw and Chickasaw nations.

In surface, the use of which is reserved to present coal operators, shall be included such lots in towns as are occupied by lessees' houses—either occupied by said lessees' employees, or as offices or warehouses: *Provided, however,* That in those town sites designated and laid out under the provision of this agreement where coal leases are now being operated and coal is being mined, there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto a sufficient amount of land, to be determined by the town-site board of appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines, and a sufficient amount for all buildings and machinery for mining purposes: *And provided further,* That when the lessees shall cease to operate said mines, then and in that event the lots of land so reserved shall be disposed of by the coal trustees for the benefit of the Choctaw and Chickasaw tribes.

That whenever the members of the Choctaw and Chickasaw tribes shall be required to pay taxes for the support of schools, then the fund arising from such royalties shall be disposed of for the equal benefit of their members (freedmen excepted) in such manner as the tribes may direct.

Section 336. Jurisdiction conferred upon United States courts.

[29]. It is further agreed that the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery, and embracery, breaches, or disturbances of the peace, and carrying weapons, hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States.

And sections sixteen hundred and thirty-six to sixteen hundred and forty-four, inclusive, entitled "Embezzlement," and sections seventeen hundred and eleven to seventeen hundred and eighteen, inclusive, entitled "Bribery and Embracery," of Mansfield's Digest of the laws of Arkansas, are hereby extended over and put in force in the Choctaw and Chickasaw nations; and the word "officer," where the same appears in said laws, shall include all officers of the Choctaw and Chickasaw governments; and the fifteenth section of the act of Congress, entitled "An act to establish United States courts in the Indian Territory, and for other purposes," approved March first, eighteen hundred and eighty-nine, limiting jurors to citizens of the United States, shall be held not to apply to United States courts in the Indian Territory held within the limits of the Choctaw and Chickasaw nations; and all members of the Choctaw and Chickasaw tribes, otherwise qualified, shall be competent jurors in said courts: *Provided*, That whenever a member of the Choctaw and Chickasaw nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted, his affidavit that he can not get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the eastern district of Texas, at Paris, Texas, always selecting

the court that in his judgment is nearest or most convenient to the place where the crime charged in the indictment is supposed to have been committed, which courts shall have jurisdiction to try the case; and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of any case, that the tribe is in any way interested in the subject-matter in controversy, it shall have power to summon in said tribe and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto; but in no case shall suit be instituted against the tribal government without its consent.

Section 337. Acts of Indian Council to be approved by President.

[29]. It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the governor thereof then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

Section 338. Tribal governments to continue for eight years.

[29]. It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the

tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.

Section 339. Per capita payments.

[23]. That all per capita payments hereafter made to the members of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary.

That the following sum be, and is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for fulfilling treaty stipulations with the Chickasaw Nation of Indians, namely:

For arrears of interest, at five per centum per annum, from December thirty-first, eighteen hundred and forty, to June thirtieth, eighteen hundred and eighty-nine, on one hundred and eighty-four thousand one hundred and forty-three dollars and nine cents of the trust fund of the Chickasaw Nation erroneously dropped from the books of the United States prior to December thirty-first, eighteen hundred and forty, and restored December twenty-seventh, eighteen hundred and eighty-seven, by the award of the Secretary of the Interior, under the fourth article of the treaty of June twenty-second, eighteen hundred and fifty-two, and for arrears of interest at five per centum per annum, from March eleventh, eighteen hundred and fifty, to March third, eighteen hundred and ninety, on fifty-six thousand and twenty-one dollars and forty-nine cents of the trust fund of the Chickasaw Nation erroneously dropped from the books of the United States March eleventh, eighteen hundred and fifty, and restored December twenty-seventh, eighteen hundred and eighty-seven, by the award of the Secretary of the Interior, under the fourth article of the treaty of June twenty-second, eighteen hundred and fifty-two, five hundred and fifty-eight thousand five hundred and twenty dollars and fifty-four cents, to be placed to the credit of the Chickasaw Nation with the fund to which it properly be-

longs: *Provided*, That if there be any attorneys' fees to be paid out of the same, on contract heretofore made and duly approved by the Secretary of the Interior, the same is authorized to be paid by him.

Section 340. Controversy with other tribes.

[29]. It is further agreed that the final decision of the courts of the United States in the case of the Choctaw Nation and the Chickasaw Nation against the United States and the Wichita and affiliated bands of Indians, now pending, when made, shall be conclusive as the basis of settlement as between the United States and said Choctaw and Chickasaw nations for the remaining lands in what is known as the "Lease District," namely, the land lying between the ninety-eighth and one hundredth degrees of west longitude and between the Red and Canadian rivers, leased to the United States by the treaty of eighteen hundred and fifty-five, except that portion called the Cheyenne and Arapahoe country, heretofore acquired by the United States, and all final judgments rendered against said nations in any of the courts of the United States in favor of the United States or any citizen thereof shall first be paid out of any sum hereafter found due said Indians for any interest they may have in the so-called leased district.

Section 341. Choctaws and Chickasaws to become citizens of the United States.

[29]. It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized within one year after the tribal governments shall cease, so far as the same may legally be done, and be appropriated and paid, by some officer of the United States appointed for the purpose, to the Choctaws and Chickasaws (freedmen excepted) per capita, to aid and assist them in improving their homes and lands.

It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.

ORPHAN LANDS.

Section 342. Orphan lands in Mississippi.

[29]. It is further agreed that the Choctaw orphan lands in the State of Mississippi, yet unsold, shall be taken by the United States at one dollar and twenty-five cents (\$1.25) per acre, and the proceeds placed to the credit of the Choctaw orphan fund in the Treasury of the United States, the number of acres to be determined by the General Land Office.

In witness whereof the said commissioners do hereunto affix their names at Atoka, Indian Territory, this the twenty-third day of April, eighteen hundred and ninety-seven.

GREEN McCURTAIN,

Principal Chief.

J. S. STANDLEY,

N. B. AINSWORTH,

BEN HAMPTON,

WESLEY ANDERSON,

AMOS HENRY,

D. C. GARLAND,

Choctaw Commission.

R. M. HARRIS,

Governor.

ISAAC O. LEWIS,

HOLMES COLBERT,

ROBERT L. MURRAY,

WILLIAM PERRY,

R. L. BOYD,

Chickasaw Commission.

FRANK C. ARMSTRONG,

Acting Chairman.

ARCHIBALD S. MCKENNON,

THOMAS B. CABANISS,

ALEXANDER B. MONTGOMERY,

Commission to the Five Civilized Tribes.

H. M. JACOWAY, Jr.,

Secretary, Five Tribes Commission.

Approved June 28, 1898.

CHAPTER LVII.

CHOCTAW-CHICKASAW SUPPLEMENTAL AGREEMENT. (32 Stat. 641.)

AN ACT to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes.

Section 343. Preamble to supplemental agreement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following agreement, made by the Commission to the Five Civilized Tribes with the commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-first day of March, nineteen hundred and two, be, and the same is hereby, ratified and confirmed, to wit:

AGREEMENT BETWEEN THE UNITED STATES AND THE CHOCTAWS AND CHICKASAWS.

This agreement, by and between the United States, entered into in its behalf by Henry L. Dawes, Tams Bixby, Thomas B. Needles, and Clifton R. Breckenridge, commissioners duly appointed and authorized thereunto, and the Choctaw and Chickasaw tribes of Indians in Indian Territory, respectively, entered into in behalf of such Choctaw and Chickasaw tribes, by Gilbert W. Dukes, Green McCurtain, Thomas E. Sanguin, and Simon E. Lewis in behalf of the Choctaw tribe of Indians; and Douglas H. Johnston, Calvin J. Grant, Holmes Willis, Edward B. Johnson, and Benjamin H. Colbert in behalf of the Chickasaw tribe of Indians, commissioners duly appointed and authorized thereunto—

Witnesseth that, in consideration of the mutual undertakings herein contained, it is agreed as follows:

DEFINITIONS.

Section 344. Definition "Nations," "Tribes."

[1]. Wherever used in this agreement the words "nations" and "tribes" shall each be held to mean the Choctaw and Chickasaw nations or tribes of Indians in Indian Territory.

Section 345. Definition "Chief Executive."

[2]. The words "chief executives" shall be held to mean the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation.

Section 346. Definition "Member," "Citizen."

[3]. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Choctaw or Chickasaw tribe of Indians in Indian Territory, not including freedmen.

Section 347. Definition "Atoka Agreement."

[4]. The term "Atoka agreement" shall be held to mean the agreement made by the Commission to the Five Civilized Tribes with the commissioners representing the Choctaw and Chickasaw tribes of Indians at Atoka, Indian Territory, and embodied in the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight. (30 Stats., 495.)

Section 348. Definition "Minor."

[5]. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

Section 349. Definition "Select."

[6]. The word "select" and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Commission to the Five Civilized Tribes for the Choctaw and Chickasaw nations, for particular tracts of land.

Section 350. Masculine includes feminine, and singular includes plural.

[7]. Every word in this agreement importing the masculine gender may extend and be applied to females as well as males, and the use of the plural may include also the singular, and vice versa.

Section 351. Allottable lands.

[8]. The terms "allottable lands" or "lands allottable" shall be deemed to mean all the lands of the Choctaw and Chickasaw tribes not herein reserved from allotment.

APPRAISEMENT OF LANDS.

Section 352. Appraisement of lands.

[9]. All the lands belonging to the Choctaw and Chickasaw tribes in the Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: *Provided*, That in determining such value consideration shall not be given to the location thereof, to any mineral deposits, or to any timber except such pine timber as may have been heretofore estimated by the Commission to the Five Civilized Tribes, and without reference to improvements which may be located thereon.

Section 353. Appraisement of lands.

[10]. The appraisement as herein provided shall be made by the Commission to the Five Civilized Tribes, and the Choctaw and Chickasaw tribes shall each have a representative to be appointed by the respective executives to co-operate with the said Commission.

ALLOTMENT OF LANDS.

Section 354. Allotment of lands.

[11]. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Section 355. Homestead inalienable during life time of allottee.

[12]. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

Section 356. Allotment of Freedmen inalienable during lifetime of allottee.

[13]. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

Section 357. Disposition of surplus tribal lands.

[14]. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

Section 358. Allotted lands—restrictions upon.

[15]. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

Section 359. Surplus allotments—alienation of permitted.

[16]. All lands allotted to members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the

expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

Section 360. Allotments—how selected.

[17]. If, for any reason, an allotment should not be selected or a homestead designated by, or on behalf of, any member or freedman, it shall be the duty of said Commission to make said selection and designation.

Section 361. Procedure in making allotments.

[18]. In the making of allotments and in the designation of homesteads for members of said tribes, under the provisions of this agreement, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in paragraph eleven hereof.

Section 362. Excessive holdings prohibited.

[19]. It shall be unlawful after ninety days after the date of the final ratification of this agreement for any member of the Choctaw or Chickasaw tribes to enclose or hold possession of in any manner, by himself or through another, directly or indirectly, more lands in value than that of three hundred and twenty acres of average allottable lands of the Choctaw and Chickasaw nations, as provided by the terms of this agreement, either for himself or for his wife, or for each of his minor children if members of said tribes; and any member of said tribes found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor.

Section 363. Excessive holdings prohibited.

[20]. It shall be unlawful after ninety days after the date of the final ratification of this agreement for any Choctaw or Chickasaw freedman to enclose or hold possession of in any manner, by himself or through another, directly or indirectly, more than so much land as shall be equal in value to forty acres of the average allottable lands of the Choctaw and Chickasaw tribes as provided by the terms of this agreement, either for himself or for his wife, or for each of his minor children, if they be Choctaw or Chickasaw freedmen; and any freedman found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor.

Section 364. Excessive holding—penalty for.

[21]. Any person convicted of violating any of the provisions of sections 19 and 20 of this agreement shall be punished by a fine not less than one hundred dollars, and shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs) and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist, shall be deemed a separate offense. And the United States district attorneys for the districts in which said nations are situated are required to see that the provisions of said sections are strictly enforced, and they shall immediately after the expiration of ninety days after the date of the final ratification of this agreement proceed to dispossess all persons of such excessive holdings of lands, and to prosecute them for so unlawfully holding the same. And the Commission to the Five Civilized Tribes shall have authority to make investigation of all violations of sections 19 and 20 of this agreement, and make report thereon to the United States district attorneys.

Section 365. Persons living September 25, 1902, but who die before selection entitled to allotments.

[22]. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

Section 366. Allotment certificates conclusive evidence of title.

[23]. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described

therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

Section 367. Commission's jurisdiction in allotment controversies.

[24]. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

EXCESSIVE HOLDINGS.

Section 368. Excessive holdings—how determined.

[25]. After the opening of a land office for allotment purposes in both the Choctaw and the Chickasaw nations any citizen or freedman of either of said nations may appear before the Commission to the Five Civilized Tribes at the land office in the nation in which his land is located and make application for his allotment and for allotments for members of his family and for other persons for whom he is lawfully authorized to apply for allotments, including homesteads, and after the expiration of ninety days following the opening of such land offices any such applicant may make allegation that the land or any part of the land that he desires to have allotted is held by another citizen or person in excess of the amount of land to which said citizen or person is lawfully entitled, and that he desires to have said land allotted to him or members of his family as herein provided; and thereupon said Commission shall serve notice upon the person so alleged to be holding land in excess of the lawful amount to which he may be entitled, said notice to set forth the facts alleged and the name and post-office address of the person alleging the same, and the rights and consequences herein provided, and the person so alleged to be holding land contrary to law shall be allowed thirty days from the date of the service of said notice in which to appear at one of said land offices and to select his allotment and the allotments he may be lawfully authorized to select, including homesteads; and if at the end of the thirty days last provided for the person upon whom said notice has been served has not selected his allot-

ment and allotments as provided, then the Commission to the Five Civilized Tribes shall immediately make or reserve said allotments for the person or persons who have failed to act in accordance with the notice aforesaid, having due regard for the best interest of said allottees; and after such allotments have been made or reserved by said Commission, then all other lands held or claimed, or previously held or claimed by said person or persons, shall be deemed a part of the public domain of the Choctaw and Chickasaw nations and be subject to disposition as such: *Provided*, That any persons who have previously applied for any part of said lands shall have a prior right of allotment of the same in the order of their applications and as their lawful rights may appear.

If any citizen or freedman of the Choctaw and Chickasaw nations shall not have selected his allotment within twelve months after the date of the opening of said land offices in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commission to the Five Civilized Tribes may immediately proceed to select an allotment, including a homestead for such person, said allotment and homestead to be selected as the Commission may deem for the best interest of said person, and the same shall be of the same force and effect as if such selection had been made by such citizen or freedman in person, and all lands held or claimed by persons for whom allotments have been selected by the Commission as provided, and in excess of the amount included in said allotments, shall be a part of the public domain of the Choctaw and Chickasaw nations and be subject to disposition as such.

RESERVATIONS.

Section 369. Reservations.

[26]. The following land shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites either by the terms of the Atoka agreement, the act of Congress of May 31, 1900, (31 Stats., 221), as herein assented to, or by the terms of this agreement.

(b) All lands to which, at the date of the final ratification of this agreement, any railroad company may under any treaty

or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance and operation of the railroad.

(c) The strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up the said Poteau River to the mouth of Mill Creek.

(d) All lands which shall be segregated and reserved by the Secretary of the Interior on account of their coal or asphalt deposits, as hereinafter provided. And the lands selected by the Secretary of the Interior at and in the vicinity of Sulphur in the Chickasaw Nation, under the cession to the United States hereunder made by said tribes.

(e) One hundred and sixty acres for Jones' Academy.

(f) One hundred and sixty acres for Tuskahoma Female Seminary.

(g) One hundred and sixty acres for Wheelock Orphan Seminary.

(h) One hundred and sixty acres for Armstrong Orphan Academy.

(i) Five acres for capitol building of the Choctaw Nation.

(j) One hundred and sixty acres for Bloomfield Academy.

(k) One hundred and sixty acres for Lebanon Orphan Home.

(l) One hundred and sixty acres for Harley Institute.

(m) One hundred and sixty acres for Rock Academy.

(n) One hundred and sixty acres for Collins Institute.

(o) Five acres for the capitol building of the Chickasaw Nation.

(p) Eighty acres for J. S. Murrow.

(q) Eighty acres for H. R. Schermerhorn.

(r) Eighty acres for the widow of R. S. Bell.

(s) A reasonable amount of land, to be determined by the town-site commissioners, to include all tribal court-houses and jails and other tribal public buildings.

(t) Five acres for any cemetery located by the town-site commissioners prior to the date of the final ratification of this agreement.

(u) One acre for any church under the control of and used exclusively by the Choctaw or Chickasaw citizens at the date of the final ratification of this agreement.

(v) One acre each for all Choctaw or Chickasaw schools

under the supervision of the authorities of the Choctaw or Chickasaw nations and officials of the United States.

And the acre so reserved for any church or school in any quarter section of land shall be located when practicable in a corner of such quarter section lying adjacent to the section line thereof.

ROLLS OF CITIZENSHIP.

Section 370. Rolls of citizenship.

[27]. The rolls of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

Section 371.—Rolls of citizenship—continued.

[28]. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in section 27 hereof shall be placed upon the rolls made by said Commission; and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws.

Section 372. Freedmen not to be enrolled as citizens.

[29]. No person whose name appears upon the rolls made by the Commission to the Five Civilized Tribes as a citizen or freedman of any other tribe shall be enrolled as a citizen or freedman of the Choctaw or Chickasaw nations.

Section 373. Membership rolls—when final.

[30]. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said Commission shall, from time

to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

Section 374. Citizenship court created.

[31]. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with

notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

Section 375. Citizenship court—jurisdiction.

[32]. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this act by Congress.

Section 376. Citizenship court—procedure in.

[33]. A court is hereby created to be known as the Choctaw and Chickasaw citizenship court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court

of the United States in compelling the production of books, papers and documents, the attendance of witnesses, and in punishing contempt. Except where herein otherwise expressly provided, the pleadings, practice and proceedings in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity causes in the circuit courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensation are hereby appropriated, and there is also hereby appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpoenaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the circuit court of the United States for the western district of Arkansas. No fees shall be charged by the clerk or

other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings, in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

Section 377. Closing rolls.

[34]. During the ninety days first following the date of the final ratification of this agreement, the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said Commission, commonly known as "delinquents," and such intermarried white persons as may have married recognized citizens of the Choctaw and Chickasaw nations in accordance with the tribal laws, customs, and usages on or before the date of the passage of this act by Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of the final ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws, for whom provision has herein otherwise been made.

Section 378. Enrolled members—when entitled to allotment.

[35]. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common prop-

erty of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement, and any person or persons who may conceal the death of anyone on said rolls as aforesaid, for the purpose of profiting by the said concealment, and who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto, a forfeiture to the Choctaw and Chickasaw nations of the lands, other tribal property, and proceeds so obtained.

CHICKASAW FREEDMEN.

Section 379. Choctaw freedmen.

[36]. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

Section 380. Bill to be filed by Attorney-General.

[37]. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw nation and the Chickasaw freedmen and praying that the defendants

thereto be required to interplead and settle their respective rights in such suit.

Section 381. Procedure in freedmen suits.

[38]. Service of process in the suit may be had on the Choctaw and Chickasaw nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw freedmen by serving upon each of three known and recognized Chickasaw freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, with the time for answering the same, for a period of three weeks in at least two weekly newspapers having general circulation in the Chickasaw Nation.

Section 382. Choctaw and Chickasaw Nations may intervene in freedmen suits.

[39]. The Choctaw and Chickasaw nations, respectively, may in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes, employ counsel to represent them in such suit and protect their interests therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw freedmen in said suit and to protect their interests therein; and the compensation of counsel so employed for the Chickasaw freedmen, including all costs of printing their briefs and other incidental expenses on their part, not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior setting forth the employment and the terms thereof, and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts the suit shall be advanced for hearing and decision at the earliest practicable time.

Section 383. Temporary allotments to Choctaw and Chickasaw freedmen.

[40]. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to effect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

MISSISSIPPI CHOCTAWS.

Section 384. Mississippi Choctaws.

[41]. All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stats., 495), as Mississippi Choctaws entitled to benefits under article 14 of the treaty between the United States and the Choctaw Nation concluded September 27, 1830, may, at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission, make bona fide settlement within the Choctaw-Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mississippi Choctaws entitled to

allotment as herein provided for citizens of the tribes, subject to the special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after six months subsequent to the date of the final ratification of this agreement and in the disposition of such applications all full-blood Mississippi Choctaw Indians and the descendants of any Mississippi Choctaw Indians whether of full or mixed blood who received a patent to land under the said fourteenth article of the said treaty of eighteen hundred and thirty who had not moved to and made bona fide settlement in the Choctaw-Chickasaw county prior to June twenty-eight, eighteen hundred and ninety-eight, shall be deemed to be Mississippi Choctaws, entitled to benefits under article fourteen of the said treaty of September twenty-seventh, eighteen hundred and thirty, and to identification as such by said Commission, but this direction or provision shall be deemed to be only a rule of evidence and shall not be invoked by or operate to the advantage of any applicant who is not a Mississippi Choctaw of the full blood, or who is not the descendant of a Mississippi Choctaw who received a patent to land under said treaty, or who is otherwise barred from the right of citizenship in the Choctaw Nation, all of said Mississippi Choctaws so enrolled by said Commission shall be upon a separate roll.

Section 385. Mississippi Choctaws—allotments upon condition.

[42]. When any such Mississippi Choctaw shall have in good faith continuously resided upon the lands of the Choctaw and Chickasaw nations for a period of three years, including his residence thereon before and after such enrollment, he shall, upon due proof of such continuous, bona fide residence, made in such manner and before such officer as may be designated by the Secretary of the Interior, receive a patent for his allotment, as provided in the Atoka agreement, and he shall hold the lands allotted to him as provided in this agreement for citizens of the Choctaw and Chickasaw nations.

Section 386. Mississippi Choctaws—enrollments of.

[43]. Applications for enrollment as Mississippi Choctaws, and applications to have land set apart to them as such, must be made personally before the Commission to

the Five Civilized Tribes. Fathers may apply for their minor children; and if the father be dead, the mother may apply; husbands may apply for wives. Applications for orphans, insane persons, and persons of unsound mind may be made by duly appointed guardian or curator, and for aged and infirm persons and prisoners by agents duly authorized thereunto by power of attorney, in the discretion of said Commission.

Section 387. Mississippi Choctaws—proof of continuous residence.

[44]. If within four years after such enrollment any such Mississippi Choctaw, or his heirs or representatives if he be dead, fails to make proof of such continuous bona fide residence for the period so prescribed, or up to the time of the death of such Mississippi Choctaw, in case of his death after enrollment, he, and his heirs and representatives if he be dead, shall be deemed to have acquired no interest in the lands set apart to him, and the same shall be sold at public auction for cash, under rules and regulations prescribed by the Secretary of the Interior, and the proceeds paid into the Treasury of the United States to the credit of the Choctaw and Chickasaw tribes, and distributed per capita with other funds of the tribes. Such lands shall not be sold for less than their appraised value. Upon payment of the full purchase price patent shall issue to the purchaser.

TOWN SITES.

Section 388. Townsites.

[45]. The Choctaw and Chickasaw tribes hereby assent to the act of Congress approved May 31, 1900 (31 Stats., 221), in so far as it pertains to town sites in the Choctaw and Chickasaw nations, ratifying and confirming all acts of the Government of the United States thereunder, and consent to a continuance of the provisions of said act not in conflict with the terms of this agreement.

Section 389. Townsites—acreage may be added.

[46]. As to those town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, as provided in said act of Congress of May 31, 1900, such additional acreage may be added thereto, in like manner as the original town site

was set apart, as may be necessary for the present needs and reasonable prospective growth of said town sites, the total acreage not to exceed six hundred and forty acres for each town site.

Section 390. Townsites—sufficient land for present and prospective growth.

[47]. The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Commission to the Five Civilized Tribes, under the provisions of said act of May 31, 1900, shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

Section 391. Townsites—compensation to owner of improvements.

[48]. Whenever any tract of land shall be set aside for town site purposes, as provided in said act of May 31, 1900, or by the terms of this agreement, which is occupied by any member of the Choctaw or Chickasaw nations, such occupant shall be fully compensated for his improvements thereon out of the funds of the tribes arising from the sale of town sites, under rules and regulations to be prescribed by the Secretary of the Interior, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe in which the town site is located, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriation for surveying, laying out, platting, and selling townsites.

Section 392. Townsites—provisions for vesting title.

[49]. Whenever the chief executive of the Choctaw or Chickasaw Nation fails or refuses to appoint a town site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town site commissioner appointed by the chief executive of the Choctaw or Chickasaw Nation to qualify or act, or otherwise, the Secretary of the Interior, in his discretion, may appoint a commissioner to fill the vacancy thus created.

Section 393. Townsites—additional commissions authorized.

[50]. There shall be appointed, in the manner provided in the Atoka agreement, such additional townsite commissions as the Secretary of the Interior may deem necessary, for the speedy disposal of all town sites in said nations: *Provided*, That the jurisdiction of said additional townsite commissions shall extend to such town sites only as shall be designated by the Secretary of the Interior.

Section 394. Townsites—patents to purchasers.

[51]. Upon the payment of the full amount of the purchase price of any lot in any town site in the Choctaw and Chickasaw nations, appraised and sold as herein provided, or sold as herein provided, the chief executives of said nations shall jointly execute, under their hands and the seals of the respective nations and deliver to the purchaser of the said lot, a patent conveying to him all right, title, and interest of the Choctaw and Chickasaw tribes in and to said lot.

Section 395. Townsites—deeds to lots.

[52]. All town lots in any one town site to be conveyed to one person shall, as far as practicable, be included in one patent, and all patents shall be executed free of charge to the grantee.

Section 396. Towns of two hundred population or less.

[53]. Such towns in the Choctaw and Chickasaw nations as may have a population of less than two hundred people, not otherwise provided for, and which in the judgment of the Secretary of the Interior should be set aside as town sites, shall have their limits defined not later than ninety days after the final ratification of this agreement, in the same manner as herein provided for other town sites; but in no such case shall more than forty acres of land be set aside for any such town site.

Section 397. Government—survey of townsites confirmed.

[54]. All town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May 31, 1900 (31 Stat., 221), with the additional acreage added thereto, and all town sites which may hereafter be set aside, as well as all town sites set

aside under the provisions of this agreement having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in a like manner, and with like preference rights accorded to owners of improvements as other town sites in the Choctaw and Chickasaw nations are surveyed, laid out, platted, appraised, and disposed of under the Atoka agreement, as modified or supplemented by the said act of May 31, 1900: *Provided*, That occupants or purchasers of lots in town sites in said Choctaw and Chickasaw nations upon which no improvements have been made prior to the passage of this act by Congress shall pay the full appraised value of said lots instead of the percentage named in the Atoka agreement.

MUNICIPAL CORPORATIONS.

Section 398. Municipal corporations.

[55]. Authority is hereby conferred upon municipal corporations in the Choctaw and Chickasaw nations, with the approval of the Secretary of the Interior, to issue bonds and borrow money thereon for sanitary purposes and for the construction of sewers, lighting plants, waterworks, and schoolhouses, subject to all the provisions of laws of the United States in force in the organized Territories of the United States in reference to municipal indebtedness and issuance of bonds for public purposes; and said provisions of law are hereby put in force in said nations and made applicable to the cities and towns therein the same as if specially enacted in reference thereto; and said municipal corporations are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when so vacated, shall become the property of the adjacent property holders.

COAL AND ASPHALT.

Section 399. Coal and asphalt.

[56]. At the expiration of two years after the final ratification of this agreement all deposits of coal and asphalt which are in lands within the limits of any town site established under the Atoka agreement, or the act of Congress of May 31, 1900, or this agreement, and which are within the exterior limits of any lands reserved from allotment on account of their coal or asphalt deposits, as herein provided, and which are not at the time of the final ratification of this agreement

embraced in any then existing coal or asphalt lease, shall be sold at public auction for cash under the direction of the President as hereinafter provided, and the proceeds thereof disposed of as herein provided respecting the proceeds of the sale of coal and asphalt lands.

Section 400. Coal and asphalt within townsite limits.

[57]. All coal and asphalt deposits which are within the limits of any town site so established, which are at the date of the final ratification of this agreement covered by any existing lease, shall, at the expiration of two years after the final ratification of this agreement, be sold at public auction under the direction of the President as hereinafter provided, and the proceeds thereof disposed of as provided in the last preceding section. The coal or asphalt covered by each lease shall be separately sold. The purchaser shall take such coal or asphalt deposits subject to the existing lease, and shall by the purchase succeed to all the rights of the two tribes of every kind and character, under the lease, but all advanced royalties received by the tribe shall be retained by them.

Section 401. Segregation of coal and asphalt.

[58]. Within six months after the final ratification of this agreement the Secretary of the Interior shall ascertain, so far as may be practicable, what lands are principally valuable because of their deposits of coal or asphalt, including therein all lands which at the time of the final ratification of this agreement shall be covered by then existing coal or asphalt leases, and within that time he shall, by a written order, segregate and reserve from allotment all of said lands. Such segregation and reservation shall conform to the subdivisions of the Government survey as nearly as may be, and the total segregation and reservation shall not exceed five hundred thousand acres. No lands so reserved shall be allotted to any member or freedmen, and the improvements of any member or freedmen existing upon any of the lands so segregated and reserved at the time of their segregation and reservation shall be appraised under the direction of the Secretary of the Interior, and shall be paid for out of any common funds of the two tribes in the Treasury of the United States, upon the order of the Secretary of the Interior. All coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be

deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands.

Section 402. Segregated lands to be sold.

[59]. All lands segregated and reserved under the last preceding section, excepting those embraced within the limits of a town site established as hereinbefore provided, shall, within three years from the final ratification of this agreement and before the dissolution of the tribal governments, be sold at public auction for cash, under the direction of the President, by a commission composed of three persons, which shall be appointed by the President, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood. Either of said commissioners may, at any time, be removed by the President for good cause shown. Each of said commissioners shall be paid at the rate of four thousand dollars per annum, the Choctaw commissioner to be paid by the Choctaw Nation, the Chickasaw commissioner to be paid by the Chickasaw Nation, and the third commissioner to be paid by the United States. In the sale of coal and asphalt lands and coal and asphalt deposits hereunder, the commission shall have the right to reject any or all bids which it considers below the value of any such lands or deposits. The proceeds arising from the sale of coal and asphalt lands and coal and asphalt deposits shall be deposited in the Treasury of the United States to the credit of said tribes and paid out per capita to the members of said tribes (freedmen excepted), with the other moneys belonging to said tribes, in the manner provided by law. The lands embraced within any coal or asphalt lease shall be separately sold, subject to such lease, and the purchaser shall succeed to all the rights of the two tribes of every kind and character, under the lease, but all advanced royalties received by the tribes shall be retained by them. The lands so segregated and reserved, and not included within any existing coal or asphalt lease, shall be sold in tracts not exceeding in area a section under the Government survey.

Section 403. Segregated lands to be sold—continued.

[60]. Upon the recommendation of the chief executive of each of the two tribes, and where in the judgment of the President it is advantageous to the tribes so to do, the

sale of any coal or asphalt lands which are herein directed to be sold may be made at any time after the expiration of six months from the final ratification of this agreement, without awaiting the expiration of the period of two years, as herein before provided.

Section 404. Leasing coal and asphalt lands.

[61]. No lease of any coal or asphalt lands shall be made after the final ratification of this agreement, the provisions of the Atoka agreement to the contrary notwithstanding.

Section 405. Sale of coal and asphalt lands.

[62]. Where any lands so as aforesaid segregated and reserved on account of their coal or asphalt deposits are in this agreement specifically reserved from allotment for any other reason, the sale to be made hereunder shall be only of the coal and asphalt deposits contained therein, and in all other respects the other specified reservation of such lands herein provided for shall be fully respected.

Section 406. Patents to purchasers of coal and asphalt lands.

[63]. The chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser of any coal or asphalt lands so sold, and to each purchaser of any coal or asphalt deposits so sold, an appropriate patent or instrument of conveyance, conveying to the purchaser the property so sold.

SULPHUR SPRINGS.

Section 407. Sulphur Springs.

[64]. The two tribes hereby absolutely and unqualifiedly relinquish, cede, and convey unto the United States a tract or tracts of land at and in the vicinity of the village of Sulphur, in the Chickasaw Nation, of not exceeding six hundred and forty acres, to be selected, under the direction of the Secretary of the Interior, within four months after the final ratification of this agreement, and to embrace all the natural springs in and about said village, and so much of Sulphur Creek, Rock Creek, Buckhorn Creek, and the lands adjacent to said natural springs and creeks as may be deemed necessary by the Secretary of the Interior for the proper utilization and control of said springs and the waters of said creeks, which lands shall be so selected as to cause the least interference with the contemplated

town site at that place consistent with the purposes for which said cession is made, and when selected the ceded lands shall be held, owned, and controlled by the United States absolutely and without any restriction, save that no part thereof shall be platted or disposed of for town-site purposes during the existence of the two tribal governments. Such other lands as may be embraced in a town site at that point shall be disposed of in the manner provided in the Atoka agreement for the disposition of town sites. Within ninety days after the selection of the lands so ceded there shall be deposited in the Treasury of the United States, to the credit of the two tribes, from the unappropriated public moneys of the United States, twenty dollars per acre for each acre so selected, which shall be in full compensation for the lands so ceded, and such moneys shall, upon the dissolution of the tribal governments, be divided per capita among the members of the tribes, freedmen excepted, as are other funds of the tribes. All improvements upon the lands so selected which were lawfully there at the time of the ratification of this agreement by Congress shall be appraised, under the direction of the Secretary of the Interior, at the true value thereof at the time of the selection of said lands, and shall be paid for by warrants drawn by the Secretary of the Interior upon the Treasurer of the United States. Until otherwise provided by law, the Secretary of the Interior may, under rules prescribed for that purpose, regulate and control the use of the water of said springs and creeks and the temporary use and occupation of the lands so ceded. No person shall occupy any portion of the lands so ceded, or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the southern district of Indian Territory: *Provided, however,* That nothing contained in this section shall be construed or held to commit the Government of the United States to any expenditure of money upon said lands or the improvements thereof, except as provided herein, it being the intention of this provision that in the future the lands and improvements herein mentioned shall be conveyed by the United States to such Territorial or State organization as may exist at the time when such convey-
is made.

MISCELLANEOUS.

Section 408. Patents, acceptance of for minors, etc.

[65]. The acceptance of patents for minors, prisoners, convicts, and incompetents by persons authorized to select their allotments for them shall be sufficient to bind such minors, prisoners, convicts, and incompetents as to the conveyance of all other lands of the tribes.

Section 409. Patents to allotments—recording and delivery.

[66]. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

Section 410. Certain provisions inapplicable to Choctaws and Chickasaws.

[67]. The provisions of section three of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight (30 Stats., 495), shall not apply to or in any manner affect the lands or other property of the Choctaws and Chickasaws or Choctaw and Chickasaw freedmen.

Section 411. Conflict with previous Acts.

[68]. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

Section 412. Allotment controversies—how determined.

[69]. All controversies arising between members as to their right to select particular tracts of land shall be determined by the Commission to the Five Civilized Tribes.

Section 413. Parents to select allotments for minors.

[70]. Allotments may be selected and homesteads designated for minors by the father or mother, if members, or by a guardian or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable person akin to them; but it shall be the duty of

said Commission to see that said selections are made for the best interests of such parties.

Section 414. No contest after nine months.

[71]. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen or freedman of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

Section 415. Per capita payment authorized.

[72]. There shall be paid to each citizen of the Chickasaw Nation, immediately after the approval of his enrollment and right to participate in distribution of tribal property, as herein provided, the sum of forty dollars. Such payment shall be made under the direction of the Secretary of the Interior, and out of the balance of the "arrears of interest" of five hundred and fifty-eight thousand five hundred and twenty dollars and fifty-four cents appropriated by the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," yet due to the Chickasaws and remaining to their credit in the Treasury of the United States; and so much of such moneys as may be necessary for such payment are hereby appropriated and made available for that purpose, and the balance, if any there be, shall remain in the Treasury of the United States, and be distributed per capita with the other funds of the tribes. And all acts of Congress or other treaty provisions in conflict with this provision are hereby repealed.

Section 416. Provisions for ratification.

[73]. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient

to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification.

Section 417. Canvass of votes.

[74]. The votes cast in both the Choctaw and Chickasaw nations shall be forthwith returned and duly certified by the precinct officers to the national secretaries of said tribes, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and the national secretary of the Choctaw Nation and the governor and national secretary of the Chickasaw Nation and two members of the Commission to the Five Civilized Tribes; and said board shall meet without delay at Atoka, Indian Territory, and canvass and count said votes, and make proclamation of the result.

In witness whereof the said commissioners do hereby affix their names at Washington, District of Columbia, this twenty-first day of March, 1902.

Approved July 1, 1902. (Ratified by Choctaws and Chickasaws September 25, 1902).

CHAPTER LVIII.

ORIGINAL CREEK AGREEMENT

(31 STAT. 861).

AN ACT to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes.

Section 418. Preamble to Creek Agreement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muskogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed, and the same shall be of full force and effect when ratified by the Creek national council. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek national council and lay before it this agreement and the act of Congress ratifying it, and if the agreement be ratified by said council, as provided in the constitution of said nation, he shall transmit to the President of the United States the act of council ratifying the agreement, and the President of the United States shall thereupon issue his proclamation declaring the same duly ratified, and that all the provisions of this agreement have become law according to the terms thereof: *Provided*, That such ratification by the Creek national council shall be made within ninety days from the approval of this act by the President of the United States.

This agreement by and between the United States, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Archibald S. McKennon; and Thomas B. Needles, duly appointed and authorized thereunto, and the Muskogee (or Creek) tribe of Indians, in Indian Territory, entered into in behalf of said tribe by Pleasant Porter, principal chief, and George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop, and Cub McIntosh, delegates, duly appointed and authorized thereunto,

Witnesseth that in consideration of the mutual undertakings herein contained it is agreed as follows:

DEFINITIONS.

Section 419. Definitions.

[1]. The words "*Creek*" and "*Muskogee*," as used in this agreement, shall be deemed synonymous, and the words "Creek Nation" and "tribe" shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. The words "principal chief" shall be deemed to refer to the principal chief of the Muskogee Nation. The words "citizen" or "citizens" shall be deemed to refer to a member or members of the Muskogee tribe or nation of Indians. The words "The Dawes Commission" or "Commission" shall be deemed to refer to the United States Commission to the Five Civilized Tribes.

GENERAL ALLOTMENT OF LANDS.

Section 420. Preliminary provisions

[2]. All lands belonging to the Creek tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only lawful improvements on lands in actual cultivation. The appraisement shall be made under direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said Commission. Each committee shall make report of its work to said Commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said Commission for its use in making allotments as herein provided.

Section 421. General allotment of lands.

[3]. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be

selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid.

Section 422. Allotments—selection of for minors, etc.

[4]. Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and incompetents shall be citizens.

Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators, or suitable persons akin to them, but it shall be the duty of said commission to see that such selections are made for the best interests of such parties.

Section 423. Excessive holdings.

[5]. If any citizen have in his possession, in actual cultivation, lands in excess of what he and his wife and minor children are entitled to take, he shall, within ninety days after the ratification of this agreement, select therefrom allot-

ments for himself and family aforesaid, and if he have lawful improvements upon such excess he may dispose of the same to any other citizen, who may thereupon select lands so as to include such improvements; but, after the expiration of ninety days from the ratification of this agreement any citizen may take any lands not already selected by another; but if lands so taken be in actual cultivation, having thereon improvements belonging to another citizen, such improvements shall be valued by the appraisement committee, and the amount paid to the owner thereof by the allottee, and the same shall be a lien upon the rents and profits of the land until paid: *Provided*, That the owner of improvements may remove the same if he desires.

Section 424. Confirming previous allotments.

[6]. All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission.

Section 425. Restrictions upon alienation of allotted lands.

[7]. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years. for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason,

deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands.

Section 402. Segregated lands to be sold.

[59]. All lands segregated and reserved under the last preceding section, excepting those embraced within the limits of a town site established as hereinbefore provided, shall, within three years from the final ratification of this agreement and before the dissolution of the tribal governments, be sold at public auction for cash, under the direction of the President, by a commission composed of three persons, which shall be appointed by the President, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood. Either of said commissioners may, at any time, be removed by the President for good cause shown. Each of said commissioners shall be paid at the rate of four thousand dollars per annum, the Choctaw commissioner to be paid by the Choctaw Nation, the Chickasaw commissioner to be paid by the Chickasaw Nation, and the third commissicner to be paid by the United States. In the sale of coal and asphalt lands and coal and asphalt deposits hereunder, the commission shall have the right to reject any or all bids which it considers below the value of any such lands or deposits. The proceeds arising from the sale of coal and asphalt lands and coal and asphalt deposits shall be deposited in the Treasury of the United States to the credit of said tribes and paid out per capita to the members of said tribes (freedmen excepted), with the other moneys belonging to said tribes, in the manner provided by law. The lands embraced within any coal or asphalt lease shall be separately sold, subject to such lease, and the purchaser shall succeed to all the rights of the two tribes of every kind and character, under the lease, but all advanced royalties received by the tribes shall be retained by them. The lands so segregated and reserved, and not included within any existing coal or asphalt lease, shall be sold in tracts not exceeding in area a section under the Government survey.

Section 403. Segregated lands to be sold—continued.

[60]. Upon the recommendation of the chief executive of each of the two tribes, and where in the judgment of the President it is advantageous to the tribes so to do, the

sale of any coal or asphalt lands which are herein directed to be sold may be made at any time after the expiration of six months from the final ratification of this agreement, without awaiting the expiration of the period of two years, as herein before provided.

Section 404. Leasing coal and asphalt lands.

[61]. No lease of any coal or asphalt lands shall be made after the final ratification of this agreement, the provisions of the Atoka agreement to the contrary notwithstanding.

Section 405. Sale of coal and asphalt lands.

[62]. Where any lands so as aforesaid segregated and reserved on account of their coal or asphalt deposits are in this agreement specifically reserved from allotment for any other reason, the sale to be made hereunder shall be only of the coal and asphalt deposits contained therein, and in all other respects the other specified reservation of such lands herein provided for shall be fully respected.

Section 406. Patents to purchasers of coal and asphalt lands.

[63]. The chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser of any coal or asphalt lands so sold, and to each purchaser of any coal or asphalt deposits so sold, an appropriate patent or instrument of conveyance, conveying to the purchaser the property so sold.

SULPHUR SPRINGS.

Section 407. Sulphur Springs.

[64]. The two tribes hereby absolutely and unqualifiedly relinquish, cede, and convey unto the United States a tract or tracts of land at and in the vicinity of the village of Sulphur, in the Chickasaw Nation, of not exceeding six hundred and forty acres, to be selected, under the direction of the Secretary of the Interior, within four months after the final ratification of this agreement, and to embrace all the natural springs in and about said village, and so much of Sulphur Creek, Rock Creek, Buckhorn Creek, and the lands adjacent to said natural springs and creeks as may be deemed necessary by the Secretary of the Interior for the proper utilization and control of said springs and the waters of said creeks, which lands shall be so selected as to cause the least interference with the contemplated

town site at that place consistent with the purposes for which said cession is made, and when selected the ceded lands shall be held, owned, and controlled by the United States absolutely and without any restriction, save that no part thereof shall be platted or disposed of for town-site purposes during the existence of the two tribal governments. Such other lands as may be embraced in a town site at that point shall be disposed of in the manner provided in the Atoka agreement for the disposition of town sites. Within ninety days after the selection of the lands so ceded there shall be deposited in the Treasury of the United States, to the credit of the two tribes, from the unappropriated public moneys of the United States, twenty dollars per acre for each acre so selected, which shall be in full compensation for the lands so ceded, and such moneys shall, upon the dissolution of the tribal governments, be divided per capita among the members of the tribes, freedmen excepted, as are other funds of the tribes. All improvements upon the lands so selected which were lawfully there at the time of the ratification of this agreement by Congress shall be appraised, under the direction of the Secretary of the Interior, at the true value thereof at the time of the selection of said lands, and shall be paid for by warrants drawn by the Secretary of the Interior upon the Treasurer of the United States. Until otherwise provided by law, the Secretary of the Interior may, under rules prescribed for that purpose, regulate and control the use of the water of said springs and creeks and the temporary use and occupation of the lands so ceded. No person shall occupy any portion of the lands so ceded, or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the southern district of Indian Territory: *Provided, however,* That nothing contained in this section shall be construed or held to commit the Government of the United States to any expenditure of money upon said lands or the improvements thereof, except as provided herein, it being the intention of this provision that in the future the lands and improvements herein mentioned shall be conveyed by the United States to such Territorial or State organization as may exist at the time when such conveyance is made.

MISCELLANEOUS.

Section 408. Patents, acceptance of for minors, etc.

[65]. The acceptance of patents for minors, prisoners, convicts, and incompetents by persons authorized to select their allotments for them shall be sufficient to bind such minors, prisoners, convicts, and incompetents as to the conveyance of all other lands of the tribes.

Section 409. Patents to allotments—recording and delivery.

[66]. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

Section 410. Certain provisions inapplicable to Choctaws and Chickasaws.

[67]. The provisions of section three of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight (30 Stats., 495), shall not apply to or in any manner affect the lands or other property of the Choctaws and Chickasaws or Choctaw and Chickasaw freedmen.

Section 411. Conflict with previous Acts.

[68]. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

Section 412. Allotment controversies—how determined.

[69]. All controversies arising between members as to their right to select particular tracts of land shall be determined by the Commission to the Five Civilized Tribes.

Section 413. Parents to select allotments for minors.

[70]. Allotments may be selected and homesteads designated for minors by the father or mother, if members, or by a guardian or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable person akin to them; but it shall be the duty of

said Commission to see that said selections are made for the best interests of such parties.

Section 414. No contest after nine months.

[71]. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen or freedman of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

Section 415. Per capita payment authorized.

[72]. There shall be paid to each citizen of the Chickasaw Nation, immediately after the approval of his enrollment and right to participate in distribution of tribal property, as herein provided, the sum of forty dollars. Such payment shall be made under the direction of the Secretary of the Interior, and out of the balance of the "arrears of interest" of five hundred and fifty-eight thousand five hundred and twenty dollars and fifty-four cents appropriated by the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," yet due to the Chickasaws and remaining to their credit in the Treasury of the United States; and so much of such moneys as may be necessary for such payment are hereby appropriated and made available for that purpose, and the balance, if any there be, shall remain in the Treasury of the United States, and be distributed per capita with the other funds of the tribes. And all acts of Congress or other treaty provisions in conflict with this provision are hereby repealed.

Section 416. Provisions for ratification.

[73]. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient

to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification.

Section 417. Canvass of votes.

[74]. The votes cast in both the Choctaw and Chickasaw nations shall be forthwith returned and duly certified by the precinct officers to the national secretaries of said tribes, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and the national secretary of the Choctaw Nation and the governor and national secretary of the Chickasaw Nation and two members of the Commission to the Five Civilized Tribes; and said board shall meet without delay at Atoka, Indian Territory, and canvass and count said votes, and make proclamation of the result.

In witness whereof the said commissioners do hereby affix their names at Washington, District of Columbia, this twenty-first day of March, 1902.

Approved July 1, 1902. (Ratified by Choctaws and Chickasaws September 25, 1902).

CHAPTER LVIII.

ORIGINAL CREEK AGREEMENT

(31 STAT. 861).

AN ACT to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes.

Section 418. Preamble to Creek Agreement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muskogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed, and the same shall be of full force and effect when ratified by the Creek national council. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek national council and lay before it this agreement and the act of Congress ratifying it, and if the agreement be ratified by said council, as provided in the constitution of said nation, he shall transmit to the President of the United States the act of council ratifying the agreement, and the President of the United States shall thereupon issue his proclamation declaring the same duly ratified, and that all the provisions of this agreement have become law according to the terms thereof: *Provided*, That such ratification by the Creek national council shall be made within ninety days from the approval of this act by the President of the United States.

This agreement by and between the United States, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Archibald S. McKennon; and Thomas B. Needles, duly appointed and authorized thereunto, and the Muskogee (or Creek) tribe of Indians, in Indian Territory, entered into in behalf of said tribe by Pleasant Porter, principal chief, and George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop, and Cub McIntosh, delegates, duly appointed and authorized thereunto,

Witnesseth that in consideration of the mutual undertakings herein contained it is agreed as follows:

DEFINITIONS.

Section 419. Definitions.

[1]. The words "*Creek*" and "*Muskogee*," as used in this agreement, shall be deemed synonymous, and the words "Creek Nation" and "tribe" shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. The words "principal chief" shall be deemed to refer to the principal chief of the Muskogee Nation. The words "citizen" or "citizens" shall be deemed to refer to a member or members of the Muskogee tribe or nation of Indians. The words "The Dawes Commission" or "Commission" shall be deemed to refer to the United States Commission to the Five Civilized Tribes.

GENERAL ALLOTMENT OF LANDS.

Section 420. Preliminary provisions

[2]. All lands belonging to the Creek tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only lawful improvements on lands in actual cultivation. The appraisement shall be made under direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said Commission. Each committee shall make report of its work to said Commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said Commission for its use in making allotments as herein provided.

Section 421. General allotment of lands.

[3]. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be

selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid.

Section 422. Allotments—selection of for minors, etc.

[4]. Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and incompetents shall be citizens.

Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators, or suitable persons akin to them, but it shall be the duty of said commission to see that such selections are made for the best interests of such parties.

Section 423. Excessive holdings.

[5]. If any citizen have in his possession, in actual cultivation, lands in excess of what he and his wife and minor children are entitled to take, he shall, within ninety days after the ratification of this agreement, select therefrom allot-

ments for himself and family aforesaid, and if he have lawful improvements upon such excess he may dispose of the same to any other citizen, who may thereupon select lands so as to include such improvements; but, after the expiration of ninety days from the ratification of this agreement any citizen may take any lands not already selected by another; but if lands so taken be in actual cultivation, having thereon improvements belonging to another citizen, such improvements shall be valued by the appraisement committee, and the amount paid to the owner thereof by the allottee, and the same shall be a lien upon the rents and profits of the land until paid: *Provided*, That the owner of improvements may remove the same if he desires.

Section 424. Confirming previous allotments.

[6]. All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission.

Section 425. Restrictions upon alienation of allotted lands.

[7]. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years. for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason,

such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Section 426. Each allottee to be placed in possession.

[8]. The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land.

Section 427. Surplus tribal lands—disposition of.

[9] When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor, the deficiency shall be supplied out of any other funds of the tribe, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided.

TOWN SITES.

Section 428. Townsites.

[10]. All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised under the provisions of an Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May thirty-first, nineteen hundred, which said provisions are as follows:

"That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks, the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

"Hereafter the work of the respective town-site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the Act of June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior and not before.

"The Secretary of the Interior may in his discretion appoint a town site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval

of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

"Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation, a separate town site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory.'

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

"As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

"The Secretary of the Interior may, for good cause, remove any member of any town site commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

"It shall not be required that the town site limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such town site limits and corporate limits shall be so established as to best subserve the then present needs

and the reasonable prospective growth of the town, as the same shall appear at the time when such limits are respectively established: *Provided further*, That the exterior limits of all town sites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

“Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. Such town sites shall be surveyed, laid out, and platted and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other town sites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided*, That hereafter the Secretary of the Interior may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a town site commissioner for any town or to fill any vacancy caused by the neglect or refusal of the town site commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion appoint a commissioner to fill the vacancy thus created.”

Section 429. Townsites.

[11]. Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised value thereof, but if he shall fail within sixty days to purchase such lot and make the first payment thereon, as herein provided, the lot and improvements shall be sold at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the pur-

chase price to the owner of the improvements, less the appraised value of the lot.

Section 430. Townsites.

[12]. Any person having the right of occupancy of a residence or business lot or both in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

Section 431. Townsites.

[13]. Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

Section 432. Townsites.

[14]. All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been divided at two-thirds of their appraised value.

Section 433. Purchase of town lots.

[15]. When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money in three equal annual installments, without interest.

Any person who may purchase an unimproved lot shall proceed to make payment for same in such time and manner as herein provided for the payment of sums due on improved lots, and if in any case any amount be not paid when due, it shall thereafter bear interest at the rate of ten per centum per annum until paid. The purchaser may in any case at any time make full payment for any town lot.

Section 434. Town lot exempted from forced sale.

[16]. All town lots purchased by citizens in accordance with the provisions of this agreement shall be free from incumbrance by any debt contracted prior to date of his deed therefor, except for improvements thereon.

Section 435. Town lots.

[17]. No taxes shall be assessed by any town government against any town lot remaining unsold, but taxes may be assessed against any town lot sold as herein provided, and the same shall constitute a lien upon the interest of the purchaser therein after any payment thereon has been made by him, and if forfeiture of any lot be made all taxes assessed against such lot shall be paid out of any money paid thereon by the purchaser.

Section 436. Cemeteries.

[18]. The surveyors may select and locate a cemetery within suitable distance from each town, to embrace such number of acres as may be deemed necessary for such purpose, and the appraisement commission shall appraise the same at not less than twenty dollars per acre, and the town may purchase the land by paying the appraised value thereof; and if any citizen have improvements thereon, other than fencing and tillage, they shall be appraised by said commission and paid for by the town. The town authorities shall dispose of the lots in such cemetery at reasonable prices, in suitable sizes for burial purposes, and the proceeds thereof shall be applied to the general improvement of the property.

Section 437. Public buildings—grounds for.

[19]. The United States may purchase in any town in the Creek Nation, suitable land for court-houses, jails, and other necessary public buildings for its use, by paying the appraised value thereof, the same to be selected under the direction of the department for whose use such buildings are to be

erected; and if any person have improvements thereon, other than temporary buildings, fencing, and tillage, the same shall be appraised and paid for by the United States.

Section 438. Authorizing sale of lands to United States.

[20]. Henry Kendall College, Nazareth Institute, and Spaulding Institute, in Muskogee, may purchase the parcels of land occupied by them, or which may have been laid out for their use and so designated upon the plat of said town, at one-half of their appraised value, upon conditions herein provided; and all other schools and institutions of learning located in incorporated towns in the Creek Nation may, in like manner, purchase the lots or parcels of land occupied by them.

Section 439. Authorizing conveyances to churches.

[21]. All town lots or parts of lots, not exceeding fifty by one hundred and fifty feet in size, upon which church houses and parsonages have been erected, and which are occupied as such at the time of appraisement, shall be properly conveyed to the churches to which such improvements belong gratuitously, and if such churches have other adjoining lots inclosed, actually necessary for their use, they may purchase the same by paying one-half the appraised value thereof.

Section 440. Authorizing surveys.

[22]. The towns of Clarksville, Coweta, Gibson Station, and Mounds may be surveyed and laid out in town lots and necessary streets and alleys, and platted as other towns, each to embrace such amount of land as may be deemed necessary, not exceeding one hundred and sixty acres for either, and in manner not to include or interfere with the allotment of any citizen selected prior to the date of this agreement, which survey may be made in manner provided for other towns; and the appraisement of the town lots of said towns may be made by any committee appointed for either of the other towns hereinbefore named, and the lots in said towns may be disposed of in like manner and on the same conditions and terms as those of other towns. All of such work may be done under the direction of and subject to the approval of the Secretary of the Interior.

TITLES.

Section 441. Conveyances to allottees.

[23]. Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the In-

terior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

The transfer of the title of the Creek tribe to individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company, any right, title, or interest in or to any of the lands in the Creek Nation.

All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records.

RESERVATIONS.

Section 442. Reservations.

[24]. The following lands shall be reserved from the general allotment herein provided for:

- (a) All lands herein set apart for town sites.
- (b) All lands to which, at the date of the ratification of this agreement, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance and operation of the railroad.
- (c) Forty acres for the Eufaula High School.
- (d) Forty acres for the Wealaka Boarding School.
- (e) Forty acres for the Newyaka Boarding School.
- (f) Forty acres for the Wetumka Boarding School.
- (g) Forty acres for the Euchee Boarding School.
- (h) Forty acres for the Coweta Boarding School.
- (i) Forty acres for the Creek Orphan Home.
- (j) Forty acres for the Tallahassee Colored Boarding School.
- (k) Forty acres for the Pecan Creek Colored Boarding School.
- (l) Forty acres for the Colored Creek Orphan Home.
- (m) All lands selected for town cemeteries, as herein provided.
- (n) The lands occupied by the university established by the American Baptist Home Mission Society, and located near the town of Muskogee, to the amount of forty acres, which shall be appraised, excluding improvements thereon, and said university shall have the right to purchase the same by paying one-half the appraised value thereof, on terms and conditions herein provided. All improvements made by said university on lands in excess of said forty acres shall be appraised and the value thereof paid to it by the person to whom such lands may be allotted.
- (o) One acre each for the six established Creek court-houses, with the improvements thereon.
- (p) One acre each for all churches and schools outside of towns now regularly used as such.

All reservations under the provisions of this agreement, except as otherwise provided herein, when not needed for the purposes for which they are at present used, shall be sold at public auction to the highest bidder, to citizens only, under directions of the Secretary of the Interior.

MUNICIPAL CORPORATIONS.

Section 443. Municipal corporations.

[25]. Authority is hereby conferred upon municipal corporation in the Creek Nation, with the approval of the Secretary of the Interior, to issue bonds and borrow money thereon for sanitary purposes, and for the construction of sewers, lighting plants, waterworks, and schoolhouses, subject to all the provisions of laws of the United States in force in the organized Territories of the United States in reference to municipal indebtedness and issuance of bonds for public purposes; and said provisions of law are hereby put in force in said nation and made applicable to the cities and towns therein the same as if specially enacted in reference thereto.

CLAIMS.

Section 444. Claims.

[26]. All claims of whatsoever nature, including the "Loyal Creek claim" under Article Four of the treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under Article Twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.

Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States Government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

Any other claim which the Creek Nation may have against the United States may be prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts.

FUNDS OF THE TRIBE.

Section 445. Funds of the tribe.

[27]. All treaty funds of the tribe shall hereafter be capitalized for the purpose of equalizing allotments and for the other purposes provided in this agreement.

ROLLS OF CITIZENSHIP.

Section 446. Rolls of citizenship.

[28] No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An Act for the protection of the people of the Indian Territory, and for other purposes," shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.

Section 447. Rolls of citizenship.

[29]. Said Commission shall have authority to enroll as Creek citizens certain full-blood Creek Indians now residing in the Cherokee Nation, and also certain full-blood Creek Indians now residing in the Creek Nation who have recently removed there from the State of Texas, and the families of full-blood Creeks who now reside in Texas, and such other recognized citizens found on the Creek rolls as might, by reason of nonresidence, be excluded from enrollment by section twenty-one of said act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight: *Provided*, That such nonresidence shall, in good faith, remove to the Creek Nation before said commission shall complete the rolls of Creek citizens as aforesaid.

MISCELLANEOUS.**Section 448. Lien for purchase price town lots.**

[30]. All deferred payments, under provisions of this agreement, shall constitute a lien in favor of the tribe on the property for which the debt was contracted, and if, at the expiration of two years from the date of payment of the fifteen per centum aforesaid, default in any annual payment has been made, the lien for the payment of all purchase money remaining unpaid may be enforced in the United States court within the jurisdiction of which the town is located in the same manner as vendor's liens are enforced; such suit being brought in the name of the principal chief, for the benefit of the tribe.

Section 449. Payments—how made.

[31]. All moneys to be paid to the tribe under any of the provisions of this agreement shall be paid, under direction of the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe, and an itemized report thereof shall be made monthly to the Secretary of the Interior and to the principal chief.

Section 450. Funds—how used or paid out.

[32]. All funds of the tribe, and all moneys accruing under the provisions of this agreement, when needed for the purposes of equalizing allotments or for any other purposes herein prescribed, shall be paid out under the direction of the Secretary of the Interior; and when required for per capita payments, if any, shall be paid out directly to each individual

by a bonded officer of the United States, under direction of the Secretary of the Interior, without unnecessary delay.

Section 451. Creek funds not to be used.

[33]. No funds belonging to said tribe shall hereafter be used or paid out for any purposes by any officer of the United States without consent of the tribe, expressly given through its national council, except as herein provided.

Section 452. Expenses of allotment.

[34]. The United States shall pay all expenses incident to the survey, platting, and disposition of town lots, and of allotment of lands made under the provisions of this agreement, except where the town authorities have been or may be duly authorized to survey and plat their respective towns at the expense of such town.

Section 453. Parents natural guardians.

[35]. Parents shall be the natural guardians of their children, and shall act for them as such unless a guardian shall have been appointed by a court having jurisdiction; and parents so acting shall not be required to give bond as guardians unless by order of such court, but they, and all other persons having charge of lands, moneys, and other property belonging to minors and incompetents, shall be required to make proper accounting therefor in the court having jurisdiction thereof in manner deemed necessary for the preservation of such estates.

Section 454. Seminole—Creek allotments.

[36]. All Seminole citizens who have heretofore settled and made homes upon lands belonging to the Creeks may there take, for themselves and their families, such allotments as they would be entitled to take of Seminole lands, and all Creek citizens who have heretofore settled and made homes upon lands belonging to Seminoles may there take, for themselves and their families, allotments of one hundred and sixty acres each, and if the citizens of one tribe thus receive a greater number of acres than the citizens of the other, the excess shall be paid for by such tribe, at a price to be agreed upon by the principal chiefs of the two tribes, and if they fail to agree, the price shall be fixed by the Indian agent, but the citizenship of persons so taking allotments shall in no wise be affected thereby.

Titles shall be conveyed to Seminoles selecting allotments of Creek lands in manner herein provided for conveyance of

Creek allotments, and titles shall be conveyed to Creeks selecting allotments of Seminole lands in manner provided in the Seminole agreement, dated December sixteenth, eighteen hundred and ninety-seven, for conveyance of Seminole allotments: *Provided*, That deeds shall be executed to allottees immediately after selection of allotment is made.

This provision shall not take effect until after it shall have been separately and specifically approved by the Creek national council and by the Seminole general council; and if not approved by either, it shall fail altogether, and be eliminated from this agreement without impairing any other of its provisions.

Section 455. Leases.

[37]. Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction, if adjoining allottees are not injured thereby, and cattle grazed thereon shall not be liable to any tribal tax; but when cattle are introduced into the Creek Nation and grazed on lands not selected by citizens, the Secretary of the Interior is authorized to collect from the owners thereof a reasonable grazing tax for the benefit of the tribe; and section twenty-one hundred and seventeen, Revised Statutes of the United States, shall not hereafter apply to Creek lands.

Section 456. Timber.

[38]. After any citizen has selected his allotment he may dispose of any timber thereon, but if he dispose of such timber, or any part of same, he shall not thereafter select other lands in lieu thereof, and his allotment shall be appraised as if in condition when selected.

No timber shall be taken from lands not so selected, and disposed of, without payment of reasonable royalty thereon, under contract to be prescribed by the Secretary of the Interior.

Section 457. Non-citizen not to pay permit tax.

[39]. No noncitizen renting lands from a citizen for agricultural purposes, as provided by law, whether such lands have been selected as an allotment or not, shall be required to pay any permit tax.

Section 458. Creek schools.

[40]. The Creek school fund shall be used, under direction of the Secretary of the Interior, for the education

of Creek citizens, and the Creek schools shall be conducted under rules and regulations prescribed by him, under direct supervision of the Creek school superintendent and a supervisor appointed by the Secretary, and under Creek laws, subject to such modifications as the Secretary of the Interior may deem necessary to make the schools most effective and to produce the best possible results.

All teachers shall be examined by or under direction of said superintendent and supervisor, and competent teachers and other persons to be engaged in and about the schools with good moral character only shall be employed, but where all qualifications are equal preference shall be given to citizens in such employment.

All moneys for running the schools shall be appropriated by the Creek national council, not exceeding the amount of the Creek school fund, seventy-six thousand four hundred and sixty-eight dollars and forty cents; but if it fail or refuse to make the necessary appropriations the Secretary of the Interior may direct the use of a sufficient amount of the school funds to pay all expenses necessary to the efficient conduct of the schools, strict account thereof to be rendered to him and to the principal chief.

All accounts for expenditures in running the schools shall be examined and approved by said superintendent and supervisor, and also by the general superintendent of Indian schools, in Indian Territory, before payment thereof is made.

If the superintendent and supervisor fail to agree upon any matter under their direction or control, it shall be decided by said general superintendent, subject to appeal to the Secretary of the Interior; but his decision shall govern until reversed by the Secretary.

Section 459. Curtis Act, except section 14, not to apply to Creeks.

[41]. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, or be in force in the Creek Nation, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation, except section fourteen of said last-mentioned act, which shall continue in force as if this agreement had not been made.

Section 460. Acts Creek Council submitted to President.

[42]. No act, ordinance, or resolution of the national council of the Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof, except appropriations for the necessary incidental and salaried expenses of the Creek government as herein limited, shall be of any validity until approved by the President of the United States. When any such act, ordinance, or resolution shall be passed by said council and approved by the principal chief, a true and correct copy thereof, duly certified, shall be immediately transmitted to the President, who shall, within thirty days after received by him, approve or disapprove the same. If disapproved, it shall be so indorsed and returned to the principal chief; if approved, the approval shall be indorsed thereon, and it shall be published in at least two newspapers having a bona fide circulation in the Creek Nation.

Section 461. Prohibition.

[43]. The United States agrees to maintain strict laws in said nation, against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever.

Section 462. Not to affect existing treaties except where inconsistent.

[44]. This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith.

Section 463. General authority conferred upon Secretary.

[45]. All things necessary to carrying into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior.

Section 464. Creek Tribal Government to expire March 4, 1906.

[46]. The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.

Section 465. Creek courts not re-established.

[47]. Nothing contained in this agreement shall be construed to revive or re-establish the Creek courts which have been abolished by former acts of Congress.

Approved, March 1, 1901.

(Ratified by the Creeks May 25, 1901.)

CHAPTER LIX.

SUPPLEMENTAL CREEK AGREEMENT.

(32 STAT. 500).

AN ACT to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes.

Section 466. Preamble to supplemental Creek Agreement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following supplemental agreement, submitted by certain commissioners of the Creek tribe of Indians, as herein amended, is hereby ratified and confirmed on the part of the United States, and the same shall be of full force and effect if ratified by the Creek tribal council on or before the first day of September, nineteen hundred and two, which said supplemental agreement is as follows:

This agreement by and between the United States, entered into in its behalf by the commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Thomas B. Needles, and Clifton R. Breckenridge, duly appointed and authorized thereunto, and the Muskogee (or Creek) tribe of Indians, in Indian Territory, entered into in behalf of the said tribe by Pleasant Porter, principal chief, Roley McIntosh, Thomas W. Perryman, Amos McIntosh, and David M. Hodge, commissioners duly appointed and authorized thereunto, witnesseth, that in consideration of the mutual undertakings herein contained it is agreed as follows:

DEFINITIONS.

Section 467. Definitions.

The words "Creek" and "Muskogee" as used in this agreement shall be deemed synonymous, and the words "Nation" and "tribe" shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. The words "principal chief" shall be deemed to refer to the principal chief of the Muskogee Nation. The words "citizen" or "citizens" shall be deemed to refer to a member or members of the Muskogee tribe or nation of Indians. The word "Commissioner" shall be deemed to refer to the United States Commission to the Five Civilized Tribes.

ALLOTMENT OF LANDS.

Section 468. Allotment of lands.

[2]. Section 2 of the agreement ratified by act of Congress approved March, 1901 (31 Stat. L., 861), is amended and as so amended is re-enacted to read as follows:

All lands belonging to the Creek tribe of Indians in Indian Territory, except town sites and lands reserved for Creek schools and churches, railroads, and town cemeteries, in accordance with the provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be appraised at not to exceed \$6.50 per acre, excluding only lawful improvements on lands in actual cultivation.

Such appraisements shall be made, under the direction and supervision of the Commission to the Five Civilized Tribes, by such number of committees with necessary assistance as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief. Said Commission shall have authority to revise and adjust the work of said committees; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said Commission. The appraisalment so made shall be submitted to the Secretary of the Interior for approval.

Section 469. Amending original agreement.

[3]. Paragraph 2 of section 3 of the agreement ratified by said act of Congress approved March 1, 1901, is amended and as so amended is re-enacted to read as follows:

If any citizen select lands the appraised value of which is \$6.50 per acre, he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and moneys equal in value to his allotment.

Section 470. Commission to have exclusive jurisdiction.

[4]. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all controversies arising between citizens as to their right to select certain tracts of land.

Section 471. Allotments may be canceled for mistake.

[5]. Where it is shown to the satisfaction of said Commission that it was the intention of a citizen to select

lands which include his home and improvements, but that through error and mistake he had selected land which did not include said home and improvements, said Commission is authorized to cancel said selection and the certificate of selection or allotment embracing said lands, and permit said citizens to make a new selection including said home and improvements; and should said land including said home and improvements have been selected by any other citizen of said nation, the citizen owning said home and improvements shall be permitted to file, within ninety days from the ratification of this agreement, a contest against the citizen having previously selected the same and shall not be prejudiced therein by reason of lapse of time or any provision of law or rules and regulations to the contrary.

DESCENT AND DISTRIBUTION.

Section 472. Descent and distribution.

[6]. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49.

ROLLS OF CITIZENSHIP.

Section 473. Rolls of citizenship.

[7]. All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L., 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as:

herein provided and be allotted and distributed to them accordingly.

Section 474. Children living May 25, 1901.

[8]. All children who have not heretofore been listed for enrollment living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895 and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

Section 475. Supplemental roll for certain children.

[9]. If the rolls of citizenship provided for by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall have been completed by said commission prior to the ratification of this agreement, the names of children entitled to enrollment under the provisions of sections 7 and 8 hereof shall be placed upon a supplemental roll of citizens of the Creek Nation, and said supplemental roll when approved by the Secretary of the Interior shall in all respects be held to be a part of the final rolls of citizenship of said tribe: *Provided*, That the Dawes Commission be, and is hereby, authorized to add the following persons to the Creek roll: Nar-wal-le-pe-se, Mary Washington, Walter Washington, and Willie Washington, who are Creek Indians but whose names were left off the roll through neglect on their part.

ROADS.

Section 476. Roads.

[10]. Public highways or roads three rods in width, being one and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision. And public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the

direction of the Secretary of the Interior while the tribal government continues, and to be paid by the Creek Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid in the same manner.

Section 477. Townsites.

[11]. In all instances of the establishment of town sites in accordance with the provisions of the act of Congress approved May 31, 1900 (31 Stat. L., 231), or those of section 10 of the agreement ratified by act of Congress approved March 1, 1901 (31 Stat. L., 861), authorizing the Secretary of the Interior, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before allotment, to set aside and reserve from allotment any lands in the Creek Nation not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed, or be in process of construction, in or through said nation prior to the allotment of lands therein, any citizen who shall have previously selected such town site, or any portion thereof, for his allotment, or who shall have been by reason of improvements therein entitled to select the same for his allotment, shall be paid by the Creek Nation the full value of his improvements thereon at time of the establishment of the town site, under rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That such citizens may purchase any of said lands in accordance with the provisions of the act of March 1, 1901 (31 Stat., L., 61): *And provided further,* That the lands which may hereafter be set aside and reserved for town sites upon recommendation of the Dawes Commission as herein provided shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, and not to exceed 640 acres for each town site, and 10 per cent of the net proceeds arising, from the sale of that portion of the land within the townsite so selected by him, or which he was so entitled to select; and this shall be in addition to his right to receive from other lands an allotment of 160 acres.

CEMETERIES.

Section 478. Cemeteries.

[12]. A cemetery other than a town cemetery included within the boundaries of an allotment shall not be desecrated by tillage or otherwise, but no interment shall be made therein except with the consent of the allottee, and any person desecrating by tillage or otherwise a grave or graves in a cemetery included within the boundaries of an allotment shall be guilty of a misdemeanor, and upon conviction be punished as provided in section 567 of Mansfield's Digest of the Statutes of Arkansas.

Section 479. Cemeteries.

[13]. Whenever the town site surveyors of any town in the Creek Nation shall have selected and located a cemetery, as provided in section 18 of the act of Congress approved March 1, 1901' (31 Stat. L., 861), the town authorities shall not be authorized to dispose of lots in such cemetery until payment shall have been made to the Creek Nation for land used for said cemetery, as provided in said act of Congress, and if the town authorities fail or refuse to make payment as aforesaid within one year of the approval of the plat of said cemetery by the Secretary of the Interior, the land so reserved shall revert to the Creek Nation and be subject to allotment. And for lands heretofore or hereafter designated as parks upon any plat or any town site the town shall make payment into the Treasury of the United States to the credit of the Creek Nation within one year at the rate of \$20 per acre, and if such payment be not made within that time the lands so designated as a park shall be platted into lots and sold as other town lots.

MISCELLANEOUS.

Section 480. Tribal funds—disposition of.

[14]. All funds of the Creek Nation not needed for equalization of allotments, including the Creek school fund, shall be paid out under direction of the Secretary of the Interior per capita to the citizens of the Creek Nation on the dissolution of the Creek tribal government.

Section 481. Certain reservations not affected.

[15]. The provisions of section 24 of the act of Congress approved March 1, 1901 (31 Stat. L., 861), for the

reservation of land for the six established Creek courthouses is hereby repealed.

Section 482. Restrictions upon alienation of allotted lands.

[16]. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

Section 483. Leases of allotted lands.

[17]. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is reenacted to read as follows:

"Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year

for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands."

Section 484. Cattle grazing regulated.

[18]. When cattle are introduced into the Creek Nation to be grazed upon either lands not selected for allotment or upon lands allotted or selected for allotment the owner thereof, or the party or parties so introducing the same, shall first obtain a permit from the United States Indian agent, Union Agency, authorizing the introduction of such cattle. The application for said permit shall state the number of cattle to be introduced, together with a description of the same, and shall specify the lands upon which said cattle are to be grazed, and whether or not said lands have been selected for allotment. Cattle so introduced and all other live stock owned or controlled by noncitizens of the nation shall be kept upon inclosed lands, and if any such cattle or other live stock trespass upon lands allotted to or selected for allotment by any citizen of said nation, the owner thereof shall, for the first trespass, make reparation to the party injured for the true value of the damages he may have sustained, and for every trespass thereafter double damages, to be recovered with costs, whether the land upon which trespass is made is inclosed or not.

Any person who shall introduce any cattle into the Creek Nation in violation of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than \$100, and shall stand committed until such fine and costs are paid, such commitment not to exceed one day for every \$2 of said fine and costs; and every day said cattle are permitted to

remain in said nation without a permit for their introduction having been obtained shall constitute a separate offense.

Section 485. Each allottee to be put in possession.

[19]. Section 8 of the agreement ratified by said act of March 1, 1901, is amended and as so amended is re-enacted to read as follows:

"The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land, and during the continuance of the tribal government the Secretary of the Interior, through such Indian agent, shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law."

Section 486. Not to repeal original agreement except where in conflict.

[20]. This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith.

Section 487. Agreement to be binding when ratified.

[21]. This agreement shall be binding upon the United States and the Creek Nation, and upon all persons affected thereby when it shall have been ratified by Congress and the Creek national council, and the fact of such ratification shall have been proclaimed as hereinafter provided.

Section 488. Submission to Creek Council.

[22]. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek Nation council and submit this agreement, as ratified by Congress, to such council for its consideration, and if the agreement be ratified by the national council, as provided in the constitution of the tribe, the principal

chief shall transmit to the President of the United States a certified copy of the act of the council ratifying the agreement, and thereupon the President shall issue his proclamation making public announcement of such ratification; thenceforward all the provisions of this agreement shall have the force and effect of law.

(Approved, June 30, 1902, ratified by the Creeks July, 1902, and proclaimed by the President August 8, 1902).

CHAPTER LX.

CHEROKEE AGREEMENT

AN ACT To provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes. (32 Stat. 716).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

DEFINITION OF WORDS EMPLOYED HEREIN.

Section 489. Definition "nation," "tribe."

[1]. The words "nation" and "tribe" shall each be held to refer to the Cherokee Nation or tribe of Indians in Indian Territory.

Section 490. Definition "principal chief."

[2]. The words "principal chief," or "chief executive" shall be held to mean the principal chief of said tribe.

Section 491. Definition "Dawes Commission."

[3]. The words "Dawes Commission" or "Commission" shall be held to mean the United States Commission to the Five Civilized Tribes.

Section 492. Definition "minor."

[4]. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

Section 493. Definition "allotable lands."

[5]. The terms "allotable lands" or "lands allotable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

Section 494. Definition "select."

[6]. The word "select" and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Dawes Commission for the Cherokee Nation, for particular tracts of land.

Section 495. Definition "member."

[7]. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory.

Section 496. Masculine to include feminine—plural to include singular.

[8]. Every word in this act importing the masculine gender may extend and be applied to females as well as males, and the use of the plural may include also the singular, and vice versa.

APPRAISEMENT OF LANDS.**Section 497. Appraisement of lands.**

[9]. The lands belonging to the Cherokee tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: *Provided*, That in the determination of the value of such land consideration shall not be given to the location thereof, to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

Section 498. Appraisement of lands.

[10]. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

ALLOTMENT OF LANDS.**Section 499. Allotment of lands.**

[11]. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

Section 500. Legal subdivisions.

[12]. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quar-

ter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Section 501. Homestead non-alienable.

[13]. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

Section 502. Allotted lands—restrictions upon alienation.

[14]. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

Section 503. Allotted lands may be alienated.

[15]. All lands allotted to the members of said tribe, except such lands as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

Section 504. Homestead to be designated.

[16]. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

Section 505. Minimum legal subdivisions.

[17]. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

Section 506. Excessive holdings.

[18]. It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor.

Section 507. Excessive holding—penalty for.

[19]. Any persons convicted of violating any of the provisions of section eighteen of this act shall be punished by a fine of not less than one hundred dollars, shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs), and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. The United States district attorney for the northern district is required to see that the provisions of said section eighteen are strictly enforced, and he shall immediately, after the expiration of the ninety days after the ratification of this act, proceed to dispossess all persons of such excessive holdings of lands and to prosecute them for so unlawfully holding the same, and the Commission to the Five Civilized Tribes shall have authority to make investigations of all violations of section eighteen and make report thereon to the United States district attorney.

Section 508. Enrolled members dying, not to participate.

[20]. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's digest of the Statutes of Arkansas: *Provided*, That the allotment thus

to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

Section 509. Allotment certificates conclusive evidence of title.

[21]. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

Section 510. Allotment controversy—jurisdiction of.

[22]. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

Section 511. Delaware-Cherokee controversies.

[23]. All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the judgment of the Court of Claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said Commission is ready to begin the allotment of lands of the tribe as herein provided, the Commission shall cause to be segregated one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eight, eighteen hundred and sixty-seven, such lands so to remain; subject to disposition according to such judgment as may be rendered in said cause; and said Commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said Commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual

rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable.

RESERVATIONS.

Section 512. Reservations.

[24]. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provisions of the act of Congress of June twenty-eight, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Springs Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Skiatook Mission near Skiatook.

(l) Four acres of Lutheran Mission school on Illinois River, north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson..

The acre so reserved for any church or schoolhouse in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

Provided, That the Methodist Episcopal Church South may, within twelve months after the ratification of this act, pay ten dollars per acre for the one hundred and sixty acres of land adjacent to the town of Vinita, and heretofore set apart by act of the Cherokee national council for the use of said church for missionary and educational purposes, and now occupied by Willie Halsell College (formerly Galloway College), and shall thereupon receive title thereto; but if said church fail so to do it may continue to occupy said one hundred and sixty acres of land as long as it uses same for the purposes aforesaid.

Any other school or college in the Cherokee Nation which claims to be entitled under the law to a greater number of acres than is set apart for said school or college by section twenty-four of this act may have the number of acres to which it is entitled by law. The trustees of such school or college shall, within sixty days after the ratification of this act, make application to the Secretary of the Interior for the number of acres to which such

school or college claims to be entitled, and if the Secretary of the Interior shall find that such school or college is, under the laws and treaties of the Cherokee Nation in force prior to the ratification of this act, entitled to a greater number of acres of land than is provided for in this act, he shall so determine and his decision shall be final. The amount so found by the Secretary of the Interior shall be set apart for the use of such college or school as long as the same may be used for missionary and educational purposes: *Provided*, That the trustees of such school or college shall pay ten dollars per acre for the number of acres so found by the Secretary of the Interior and which have been heretofore set apart by act of the Cherokee national council for use of such school or college for missionary or educational purposes, and upon the payment of such sum within sixty days after the decision of the Secretary of the Interior said college or school may receive a title to such land.

ROLL OF CITIZENSHIP.

Section 513. Rolls of citizenship.

[25]. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

Section 514. Rolls of citizenship.

[26]. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

Section 515. Rolls of citizenship.

[27]. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, (Thirtieth Statutes, page four

hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

Section 516. Rolls of citizenship.

[28]. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

Section 517. Enrollment when approved by Secretary final.

[29]. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

Section 518. Enrollment of infant children.

[30]. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

Section 519. Not to participate in allotment if name not on tribal roll or died prior to September 1, 1902.

[31]. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in

any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

SCHOOLS.

Section 520. Schools.

[32]. The Cherokee school fund shall be used, under the direction of the Secretary of the Interior, for the education of children of Cherokee citizens, and the Cherokee schools shall be conducted under rules prescribed by him according to Cherokee laws, subject to such modifications as he may deem necessary to make the schools most effective and to produce the best possible results; said schools to be under the supervision of a supervisor appointed by the Secretary and a school board elected by the national council.

Section 521. Schools.

[33]. All teachers shall be examined by said supervisor, and said school board and competent teachers and other persons to be engaged in and about the schools with good moral character only shall be employed; but where all qualifications are equal, preference shall be given to citizens of the Cherokee Nation in such employment.

Section 522. Schools.

[34]. All moneys for carrying on the schools shall be appropriated by the Cherokee national council, not to exceed the amount of the Cherokee school fund; but if the council fail or refuse to make the necessary appropriations, the Secretary of the Interior may direct the use of a sufficient amount of the school fund to pay all necessary expenses for the efficient conduct of the schools, strict account therefor to be rendered to him and the principal chief.

Section 523. Schools.

[35]. All accounts for expenditures in carrying on the schools shall be examined and approved by said supervisor, and also by the general superintendent of Indian schools in the Indian Territory, before payment thereof is made.

Section 524. Schools.

[36]. The interest arising from the Cherokee orphan fund shall be used, under the direction of the Secretary of the Interior, for maintaining the Cherokee Orphan Asylum for the benefit of the Cherokee orphan children.

ROADS.**Section 525. Roads.**

[37]. Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers, and others shall take the title to such lands subject to this provision; and public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues and to be paid by the Cherokee Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid for in the same manner.

TOWN SITES.

Section 526. Townsites.

[38]. The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Dawes Commission under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

Section 527. Townsites—compensation to owner for improvements.

[39]. Whenever any tract of land shall be set aside by the Secretary of the Interior for town-site purposes, as provided in said act of May thirty-first, nineteen hundred, or by the terms of this act, which is occupied at the time of such segregation by any member of the Cherokee Nation, such occupant shall be allowed to purchase any lot upon which he then has improvements other than fences, tillage, and temporary improvements, in accordance with the provisions of the act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), or, if he so elects, the lot will be sold under rules and regulations to be prescribed by the Secretary of the Interior, and he shall be fully compensated for his improvements thereon out of the funds of the tribe arising from the sale of the town sites, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriations for surveying, laying out, platting, and selling town sites.

Section 528. Townsite where population less than two hundred.

[40]. All town sites which may hereafter be set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-

one), with the additional acreage added thereto, as well as all town sites set aside under the provisions of this act having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in like manner, and with like preference rights accorded to owners of improvements as other town sites in the Cherokee Nation are surveyed, laid out, platted, appraised, and disposed of under the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), as modified or supplemented by the act of May thirty-first, nineteen hundred: *Provided*, That as to the town sites set aside as aforesaid the owner of the improvements shall be required to pay the full appraised value of the lot instead of the percentage named in said act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five).

Section 529. Town lots—preference right to purchase.

[41]. Any person being in possession or having the right to the possession of any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any town-site act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

Section 530. Town lots—preference right to purchase.

[42]. Any person being in possession of, or having the right to the possession of, any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress, approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any town-site act of the Cherokee Nation, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

Section 531. Town lots—preference right to purchase.

[43]. Any citizen in rightful possession of any town lot having improvements thereon other than temporary

buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof: *Provided*, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof.

Section 532. Town lots—unimproved, how sold.

[44]. All lots not having thereon improvements other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after appraisement, under the direction of the Secretary of the Interior, after due advertisement, at public auction, to the highest bidder, at not less than their appraised value.

Section 533. Town lots—failure to purchase.

[45]. When the appraisement of any town lot is made and approved, the townsite commission shall notify the claimant thereof of the amount of appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money he shall pay in three equal annual installments without interest; but if the claimant of any such lot fail to purchase same or make the first and second payments aforesaid or make any other payment within the time specified, the lot and improvements shall be sold at public auction to the highest bidder, under the direction of the Secretary of the Interior, at a price not less than its appraised value.

Section 534. Town lots—how sold when owner of improvements fails to purchase.

[46]. When any improved lot shall be sold at public auction because of the failure of the person owning improvements thereon to purchase same within the time allowed in said act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), said improvements shall be appraised by a committee, one member of which shall be selected by the owner of the improvements and one member by the purchaser of said lot; and

in case the said committee is not able to agree upon the value of said improvements, the committee may select a third member, and in that event the determination of the majority of the committee shall control. Said committee of appraisement shall be paid such compensation for their services by the two parties in interest, share and share alike, as may be agreed upon, and the amount of said appraisement shall be paid by the purchaser of the lot to the owner of the improvements in cash within thirty days after the decision of the committee of appraisement.

Section 535. Town lots—terms of sale.

[47]. The purchaser of any unimproved town lot sold at public auction shall pay twenty-five per centum of the purchase money at the time of the sale, and within four months thereafter he shall pay twenty-five per centum additional, and the remainder of the purchase money he shall pay in two equal annual installments without interest.

Section 536. Towns of less than two hundred population.

[48]. Such towns in the Cherokee Nation as may have a population of less than two hundred people not otherwise provided for, and which, in the judgment of the Secretary of the Interior, should be set aside as town sites, shall have their limits defined as soon as practicable after the approval of this act in the same manner as provided for other town sites.

Section 537. Cemeteries.

[49]. The town authorities of any town site in said Cherokee Nation may select and locate, subject to the approval of the Secretary of the Interior, a cemetery within suitable distance from said town, to embrace such number of acres as may be deemed necessary for such purpose. The town-site commission shall appraise the same at its true value, and the town may purchase the same within one year from the approval of the survey by paying the appraised value. If any citizen have improvements thereon, said improvements shall be appraised by said town-site commission and paid for by the town: *Provided*, That lands already laid out by tribal authorities for cemeteries shall be included in the cemeteries herein provided for without cost to the towns, and the holdings of the burial lots therein now occupied for such purpose shall in no wise be disturbed: *And provided further*, That any park laid out and surveyed in any town shall be duly appraised at a fair valuation, and the inhabi-

tants of said town shall, within one year after the approval of the survey and the appraisement of said park by the Secretary of the Interior, pay the appraised value to the proper officer for the benefit of the tribe.

Section 538. Expenses of allotments and townsites.

[50]. The United States shall pay all expenses incident to surveying, platting, and disposition of town lots, and all allotments of lands made under the provisions of this plan of allotment, except where the town authorities may have been or may be duly authorized to survey and plat their respective towns at the expense of such towns.

Section 539. Town lots—when may be taxed.

[51]. No taxes shall be assessed by any town government against any town lot remaining unsold, but taxes may be assessed against any town lot sold as herein provided.

Section 540. Town lots—failure of purchaser to pay purchase price.

[52]. If the purchaser of any town lot fail to make payment of any sum when due, the same shall thereafter bear six per centum interest per annum until paid.

Section 541. Lots for churches.

[53]. All lots or parts of lots, not exceeding fifty by one hundred and fifty feet in size, upon which church houses and parsonages have been erected, and which are occupied as such at the time of appraisement, shall be conveyed gratuitously to the churches to which such improvements belong, and if such churches have inclosed other adjoining lots actually necessary for their use, they may purchase the same by paying the appraised value thereof.

Section 542. Townsite commissions.

[54]. Whenever the chief executive of the Cherokee Nation fails or refuses to appoint a townsite commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioners appointed by the chief executive to qualify or act, or otherwise, the Secretary of the Interior, in his discretion, may appoint a commissioner to fill the vacancy thus created.

Section 543. Payment for lots.

[55]. The purchaser of any town lot may at any time pay the full amount of the purchase money; and he shall thereupon receive title therefor.

Section 544. Who may bid at lot sales.

[56] Any person may bid for and purchase any lot sold at public auction as herein provided.

Section 545. United States may acquire necessary lots.

[57]. The United States may purchase in any town in the Cherokee Nation suitable lands for court-houses, jails, or other necessary public purposes for its use by paying the appraised value thereof, the same to be selected under the direction of the department for whose use such lands are needed, and if any person have improvements thereon the same shall be appraised in like manner as other town property, and shall be paid for by the United States.

TITLES.

Section 546. Patents to lots.

[58]. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

Section 547. Patents to be approved by Secretary.

[59]. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

Section 548. Acceptance of patent effect of.

[60]. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

Section 549. Acceptance of patents for minors, etc.

[61]. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

Section 550. Patents to be recorded.

[62]. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.**Section 551. Tribal government to expire.**

[63]. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

Section 552. Tribal revenues.

[64]. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

Section 553. Commission's authority conferred upon Secretary.

[65]. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

Section 554. Per capita payments.

[66]. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

Section 555. Payment of tribal indebtedness.

[67]. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been con-

tracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable, and he shall make all needed rules and regulations to carry this provision into effect.

Section 556. Tribal citizenship—jurisdiction conferred upon Court of Claims in certain cases.

[68]. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time.

Section 557. No contest after nine months.

[69]. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest

shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

Section 558. Allotments—by whom selected.

[70]. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

Section 559. Allotments around National Seminary.

[71]. Any allottee taking as his allotment lands located around the Cherokee National Male Seminary, the Cherokee National Female Seminary, or Cherokee Orphan Asylum which have not been reserved from allotments as herein provided, and upon which buildings, fences, or other property of the Cherokee Nation are located, such buildings, fences, or other property shall be appraised at the true value thereof and be paid for by the allottee taking such lands as his allotment, and the money to be paid into the Treasury of the United States to the credit of the Cherokee Nation.

Section 560. Regulating renting allotments.

[72]. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on

lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

Section 561. Treaties or laws in conflict with not to be in force.

[73]. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

Section 562. Not to be effective until ratified.

[74]. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

Section 563. Procedure upon ratification.

[75]. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result, and transmit the same to the President of the United States.

Approved, July 1, 1902.

(Ratified by Cherokees Aug. 7, 1902.)

CHAPTER LXI.

TIMBER AND STONE.

AN ACT to provide for the use of timber and stone for domestic and industrial purposes in the Indian Territory. (31 Stat. 660).

Section 564. Timber and stone—sale of permitted.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized to prescribe rules and regulations for the procurement of timber and stone for such domestic and industrial purposes, including the construction, maintenance, and repair of railroads and other highways, to be used only in the Indian Territory, as in his judgment he shall deem necessary and proper, from lands belonging to either of the Five Civilized Tribes of Indians, and to fix the full value thereof to be paid therefor, and collect the same for the benefit of said tribes; and every person who unlawfully cuts, or aids, or is employed in unlawfully cutting, or wantonly destroys, or procures to be wantonly destroyed, any timber standing upon the land of either of said tribes, or sells or transports any of such timber or stone outside of the Indian Territory, contrary to the regulations prescribed by the Secretary, shall pay a fine of not more than five hundred dollars, or be imprisoned not more than twelve months, or both, in the discretion of the court trying the same. (31 Stat., 660.)

Approved, June 6, 1900.

AN ACT to amend an act entitled "An act to provide for the use of timber and stone for domestic and industrial purposes in the Indian Territory," approved June sixth, nineteen hundred.

Section 565. Timber and stone—right to sell recognized.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to provide for the use of timber and stone for domestic and industrial purposes in the Indian Territory," approved June sixth, nineteen hundred, be amended so as to read as follows:

“That the Secretary of the Interior is authorized to prescribe rules and regulations for the procurement of timber and stone for domestic and industrial purposes, including the construction, maintenance, and repair of railroads and other highways, to be used only in the Indian Territory, or upon any railroad outside of the said Territory which is part of any continuous line of railroad extending into the said Territory, from lands belonging to either of the Five Civilized Tribes, and to fix the full value thereof to be paid therefor, and collect the same for the benefit of said tribes; *Provided, however,* That nothing herein contained shall be construed to prevent allottees from disposing of timber and stone on their allotments, as provided in section sixteen of an act entitled ‘An act for the protection of the people of the Indian Territory, and for other purposes,’ approved June twenty-eighth, eighteen hundred and ninety-eight, from and after the allotment by the Commission to the Five Civilized Tribes.

Section 566. Illegal cutting of timber prohibited.

[2]. That every person who unlawfully cuts, or aids, or is employed in unlawful cutting, or wantonly destroys, or procures to be wantonly destroyed, any timber standing upon the lands of either of said tribes contrary to the provisions of this act and the regulations prescribed thereunder by the Secretary of the Interior, shall pay a fine of not more than five hundred dollars, or be imprisoned not more than twelve months, or both, in the discretion of the court trying the same.”

Approved, January 21, 1903. (32 Stat. 774).

CHAPTER LXII.

Act April 26, 1906.

AN ACT to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes. (34 Stat. 137).

Section 567. Citizenship.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

Section 568. Citizenship.

[2]. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to chil-

dren so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

Section 569. Freedmen.

[3]. That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and es-

tablished such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered "homesteads," and shall be subject to all the provisions of this or any other Act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes.

Section 570. Transfers from freedmen to tribal rolls prohibited.

[4]. That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrollment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer, and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually received such application within the time prescribed by law.

Section 571. Patents or deeds to vest title in heirs or assignee.

[5]. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect

any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act.

Section 572. Governor or principal chief may be removed.

[6]. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

Provided, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

Section 573. Certain reservations authorized.

[7]. That the Secretary of the Interior shall, by written order, within ninety days from the passage of this Act, segregate and reserve from allotment sections one, two, three, four, five, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, the east half of section sixteen, and the northeast quarter of section six, in township nine south, range twenty-six east, and sections five, six, seven, eight, seventeen, eighteen, and the west half of section sixteen, in township nine south, range twenty-seven east, Choctaw Nation, Indian Territory, except such portions of said lands upon which substantial, permanent, and valuable improvements were erected and placed prior to the passage of this Act and not for speculation, but by members and freedmen of the tribes actually themselves and for themselves for allotment purposes, and where such identical members or freed-

men of said tribes now desire to select same as portions of their allotments, and the action of the Secretary of the Interior in making such segregation shall be conclusive. The Secretary of the Interior shall also cause to be estimated and appraised the standing pine timber on all of said land, and the land segregated shall not be allotted, except as hereinbefore provided, to any member or freedman of the Choctaw and Chickasaw tribes. Said segregated land and the pine timber thereon shall be sold and disposed of at public auction, or by sealed bids for cash, under the direction of the Secretary of the Interior.

Section 574. Records—how preserved.

[8]. That the records of each of the land offices in the Indian Territory, should such office be hereafter discontinued, shall be transferred to and kept in the office of the clerk of the United States court in whose district said records are now located. The officer having custody of any of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and the disposition of the land and other property of said tribes, upon proper application and payment of such fees as the Secretary of the Interior may prescribe, may make certified copies of such records, which shall be evidence equally with the originals thereof; but fees shall not be demanded for such authenticated copies as may be required by officers of any branch of the Government nor for such unverified copies as such officer, in his discretion, may deem proper to furnish. Such fees shall be paid to bonded officers or employees of the Government, designated by the Secretary of the Interior, and the same or so much thereof as may be necessary may be expended under the direction of the Secretary of the Interior for the purposes of this section, and any unexpended balance shall be deposited in the Treasury of the United States, as are other public moneys.

Section 575. Controversies referred to Court of Claims.

[9]. The disbursements, in the sum of one hundred and eighty-six thousand dollars, to and on account of the loyal Seminole Indians, by James E. Jenkins, special agent appointed by the Secretary of the Interior, and by A. J. Brown as administrator de bonis non, under an Act of Congress approved May thirty-first, nineteen hundred, appropriating said sum, be.

and the same are hereby, ratified and confirmed: *Provided*, That this shall not prevent any individual from bringing suit in his own behalf to recover any sum really due him.

That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of said Choctaws.

Section 576. Secretary to take charge of tribal schools.

[10]. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five,

“for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations,” unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

Section 577 Secretary to collect tribal revenues.

[11]. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in

his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

Section 578. Secretary to sell certain tribal lands and property.

[12]. That the Secretary of the Interior is authorized to sell, upon such terms and under such rules and regulations as he may prescribe, all lots in towns in the Choctaw and Chickasaw nations reserved from appraisement and sale for use in connection with the operation of coal and asphalt mining leases or for the occupancy of miners actually engaged in working for lessees operating coal and asphalt mines, the proceeds arising from such sale to be deposited in the Treasury of the United States as are other funds of said tribes.

If the purchaser of any town lot sold under the provisions of law regarding the sale of town sites in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole nations fail for sixty days after approval hereof to pay the purchase price or any installment thereof then due, or shall fail for thirty days to pay the purchase price or any installment thereof falling due hereafter, he shall forfeit all rights under his purchase, together with all money paid thereunder, and the Secretary of the Interior may cause the lots upon which such forfeiture is made to be resold at public auction for cash, under such rules and regulations as he may prescribe. All municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners.

Section 579. Coal and asphalt lands reserved.

[13]. That all coal and asphalt lands whether leased or unleased shall be reserved from sale under this Act until the existing leases for coal and asphalt lands shall have expired or until such time as may be otherwise provided by law.

Section 580. Conveyance of land reserved to railway companies.

[14]. That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are, with the approval of the Secretary of the Interior, hereby authorized and directed to issue patents to the Murrow Indian Orphan's Home, a corporation of Atoka, Indian Territory, in all cases where tracts have been allotted under the direction of the Secretary of the Interior for the purpose of allowing the allottees to donate the tract so allotted to said Murrow Indian Orphans' Home.

In all cases where enrolled citizens of either the Choctaw or Chickasaw tribe have taken their homestead and surplus allot-

ment and have remaining over an unallotted right to less than ten dollars on the basis of the allotment value of said lands, such unallotted right may be conveyed by the owners thereof to the Murrow Indian Orphans' Home aforesaid; and whenever said conveyed rights shall amount in the aggregate to as much as ten acres of average allottable land, land to represent the same shall be allotted to the said Murrow Indian Orphans' Home, and certificate and patent shall issue therefor to said Murrow Indian Orphans' Home.

And there is hereby authorized to be conveyed to said Murrow Indian Orphans' Home, in the manner hereinbefore prescribed for the conveyance of land, the following-described lands in the Choctaw and Chickasaw nations, to wit: Sections eighteen and nineteen in township two north, range twelve east; the south half of the northeast quarter, the northeast quarter of the northeast quarter, the south half of the northwest quarter of the northeast quarter, the south half of the southeast quarter, the northeast quarter of the southeast quarter, the south half of the northwest quarter of the southeast quarter, the northeast quarter of the northwest quarter of the southeast quarter, the northeast quarter of the southeast quarter of the southwest quarter, and the northwest quarter of the northwest quarter of section twenty-four, and the northwest quarter of the southeast quarter, the north half of the southwest quarter of the southeast quarter, the south half of the southwest quarter of the southwest quarter, the northeast quarter of the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of the southwest quarter of section twenty-three, and the southwest quarter of the southwest quarter of the southeast quarter of section twenty-six, and the southeast quarter of the northwest quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter, the northeast quarter of the northeast quarter of the northwest quarter, and the east half of the southeast quarter of the northwest quarter of section twenty-five, all in township two north, range eleven east, containing one thousand seven hundred and ninety acres, as shown by the Government survey, for the purpose of the said Home.

Section 581. Secretary to sell buildings and property of tribes.

[15]. The Secretary of the Interior shall take possession of all buildings now or heretofore used for govern-

mental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes: *Provided*, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.

Section 582. Freedmen—certain preference rights given to.

[16]. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Con-

veyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

Section 583. Disposition of tribal funds.

[17]. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

Section 584. Secretary authorized to collect tribal funds.

[18]. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated

any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

Section 585. Extension of restrictions upon alienation by full-blood allottees.

[19]. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior:

Section 586. Leases by full-blood allottees.

[19]. *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations:

Section 587. Conveyances before patent not to be held invalid.

[19]. *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void:

Section 588. Lands—when subject to taxation.

[19]. *Provided, further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation, as long as the title remains in the original allottee.

Section 589. Allottees—may lease when.

[20]. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

Section 590. Allotted lands in default of heirs to revert.

[21]. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

Section. 591. Authorizing alienation of inherited lands.

[22]. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

Section 592. Wills—when may be made.

[23]. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*. That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

Section 593. Public roads—Choctaw, Chickasaw and Seminole Nations.

[24]. That in the Choctaw, Chickasaw, and Seminole nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.

All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain: *Provided, however,* That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction.

Section 594. Right of eminent domain conferred.

[25]. That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works,

pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light, or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An Act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered Twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act, for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs and auxiliary steam works, pole lines and conduits are

to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

Section 595. Street improvements authorized.

[26]. That in addition to the powers now conferred by law, all municipalities in the Indian Territory having a population of over two thousand to be determined by the last census taken under any provision of law or ordinance of the council of such municipality, are hereby authorized and empowered to order improvements of the streets or alleys or such parts thereof as may be included in an ordinance or order of the common council with the consent of a majority of the property owners whose property as herein provided is liable to assessment therefor for the proposed improvement; and said council is empowered and authorized to make assessments and levy taxes with the consent of a majority of the property owners whose property is assessed, for the purpose of grading, paving, macadamizing, curbing, or guttering streets and alleys, or building sidewalks upon and along any street, roadway or alley within the limits of such municipality, and the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk constructed, or other improvements under authority of this section, shall be so assessed against the abutting property as to require each parcel of land to bear the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk, as far as it abuts thereon, and in the case of streets or alleys to the center thereof; and the cost of street intersections or crossings may be borne by the city or apportioned to the quarter blocks abutting thereon upon the same basis. The special assessments provided for by this section and the amount to be charged against each lot or parcel of land shall be fixed by the city council or under its authority and shall become a lien on such abutting property, which may be enforced as other taxes are enforced under the laws in force in the Indian Territory. The total amount charged against any tract or parcel of land shall not exceed twenty per centum of its assessed value, and

there shall not be required to be paid thereon exceeding one per centum per annum on the assessed value and interest at six per centum on the deferred payments.

For the purpose of paying for such improvements the city council of such municipality is hereby authorized to issue improvement script or certificates for the amount due for such improvements, said script or certificates to be payable in annual installments and to bear interest from date at the rate of six per centum per annum, but no improvement script shall be issued or sold for less than its par value. All of said municipalities are hereby authorized to pass all ordinances necessary to carry into effect the above provisions and for the purpose of doing so may divide such municipality into improvement districts.

Section 596. Taxation of railway property authorized.

[26]. That the tangible property of railroad corporations (exclusive of rolling stock) located within the corporate limits of incorporated cities and towns in the Indian Territory shall be assessed and taxed in proportion to its value the same as other property is assessed and taxed in such incorporated cities and towns; and all such city or town councils are hereby empowered to pass such ordinances as may be necessary for the assessment, equalization, levy and collection, annually, of a tax on all property except as herein stated within the corporate limits and for carrying the same into effect: *Provided*, That should any person or corporation feel aggrieved by any assessment of property in the Indian Territory, an appeal from such assessment may be taken within sixty days by original petition to be filed in United States court in the district in which such city or town is located, and the question of the amount and legality of such assessment, and the validity of the ordinance under which such assessment is made may be determined by such court and the costs of such proceeding shall be taxed and apportioned between the parties as the court shall find to be just and equitable.

Section 597. Tribal lands not to become public lands.

[27]. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively com-

prising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

Section 598. Tribal existence continued.

[28]. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

Section 599. Acts in conflict with repealed.

[29]. That all acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

Approved, April 26, 1906.

CHAPTER LXIII.

ACT MAY 27, 1908.

AN ACT for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes. (35 Stat. 312).

Section 600. Restrictions upon alienation removed.

[1]. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

Section 601. Secretary may continue remove restrictions.

[1]. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act.

Section 602. Eminent domain—restrictions upon alienation.

[1]. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Section 603. Lease of allotted lands.

[2]. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal:

Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise:

Section 604. Jurisdiction remitted to State courts.

[2]. And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Section 605. Rolls conclusive evidence of quantum of Indian blood and age.

[3]. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five

Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

Section 606. Mineral leases.

[3]. That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

Section 607. Taxation where restrictions are removed.

[4]. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

Section 608. Conveyance, etc., before removal of restrictions declared void.

[5]. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such re-

stricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

Section 609. Minors; jurisdiction of probate courts.

[6]. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all

leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior:

Section 610. Leases of lands of minors.

[6]. *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

Section 611. Appropriation.

[6]. And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Section 612. Suits to recover town lots may be dismissed when.

[6]. Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dis-

missed and the title quieted upon payment of the full balance due on the original appraisement of such lot: *Provided*, That such investigation must be concluded within six months after the passage of this act.

Section 613. United States not prohibited from bringing suits.

[6]. Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

Section 614. Limitation upon the right to contest.

[7]. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

Section 615. Amending Curtis Act.

[8]. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."

Section 616. Alienation of inherited lands.

[9]. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall

be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee:

Section 617. Alienation of inherited lands—continued.

[9]. *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions:

Section 618. Wills.

[9]. *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Section 619. Payment of Tribal debts.

[10]. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw nations, and drawn on the national treasurers thereof prior to January first, nineteen hundred and seven, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That

such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

Section 620. Royalties from mineral leases.

[11]. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

Section 621. Allotment records.

[12]. That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior may direct, the sum of fifteen thousand dollars, or so much thereof as may be necessary to enable the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties.

Section 622. Tribal property.

[13]. That the second paragraph of section eleven of an act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth nineteen hundred and six, is hereby amended to read as follows:

That every officer, member or representative of the Five Civilized Tribes, respectively, or any other person, having in his possession, custody or control, any money or other property, including the books, documents, records or any other papers, of any

of said tribes, shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody or control, and shall deliver all other tribal properties so held by him to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided, prior to July thirty-first, nineteen hundred and eight, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by fine of not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe or tribes in interest for the amount or value of the money or property so withheld.

Section 623. Townsites.

[14]. That the provisions of section thirteen of the Act of Congress approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots in town sites heretofore established, surveyed, platted, and appraised under the direction of the Secretary of the Interior, but nothing herein contained shall be construed to authorize the conveyance of any interest in the coal or asphalt underlying said lots.

Approved, May 27, 1908.

CHAPTER LXIV.

DECENT AND DISTRIBUTION.

(Mansfield's Digest, Statutes Arkansas 1884. Chap. 49.)

Put in force in Indian Territory May 2, 1890—made applicable to persons and Estates of Indians and Freedmen April 21, 1904.

Section 624. General law of descent.

[2522]. When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts,

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts. *Kelley v. McGuire*, 15 Ark. 555; *Scull v. Vaugine, Ib.*, 695; *Bird v. Lipscomb*, 20 Ark. 19; *Galloway v. Robinson*, 19 Ark. 101; *Campbell v. Ware*, 27 Ark. 65; *Beard v. Mosely*, 30 Ark. 517; *Oliver v. Vance*, 34 Ark. 564; *Kountz v. Davis, Ib.*, 590; *Loftis v. Glass*, 15 Ark. 680; *Gibson v. Dowell*, 42 Ark. 164; *Garnett v. Beam*, 51 Ark. 52; *Cool-edge v. Burk*, 69 Ark. 27; *McFarlane v. Grober*, 70 Ark. 371; *Johnson v. Knights of Honor*, 53 Ark. 255; *Davidson v. Gibson*, 56 Fed. 443.

Section 625. Posthumous children—how to inherit.

[2523]. Posthumous children of the intestate shall inherit in like manner as if born in the life-time of the

intestate, but no right of inheritance shall accrue to any person other than the children of the intestate, unless they be born at the time of the intestate's death.

Section 626. Illegitimate children to inherit and transmit on part of mother.

[2524]. Illegitimate children shall be capable of inheriting and transmitting an inheritance, on the part of their mother, in like manner as if they had been legitimate of their mother. *Gregley v. Jackson*, 38 Ark. 487.

Section 627. How legitimized by subsequent marriage.

[2525]. If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate.

Section 628. Issue of invalid marriages.

[2526]. The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate.

Section 629. No bar that ancestor was alien.

[2527]. In making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is or has been, an alien.

Section 630. No kindred to inherit, whole to go to wife or husband—estate to escheat.

[2528]. If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the state.

Section 631. Some children dead and some living to take per stirpes.

[2529]. If any of the children of an intestate be living, and some be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died, so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who shall have died leaving issue had been living, so that the descendants of each child who shall be dead shall inherit the same their parent would have received if living.

Section 632. This rule to apply in every case where those entitled to inherit in equal degrees of consanguinity to intestate.

[2530]. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, shall be in equal degree of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them had all the descendants in the same degree who shall have died leaving issue been living, so that the issue of the descendants who shall have died shall respectively take the shares which their parents, if living, would have received.

Section 633. If there is no descendants, rules of descent. 1 Where estate comes by father; 2. by mother; and 3. where a new acquisition.

[2531]. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life-time, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided. *Galloway v. Robinson*, 19 Ark. 396; *Magness v. Arnold*, 31 Ark. 103; *Hogan v. Finley*, 52 Ark. 55.

Section 634. Estate, how to go, where no father or mother.

[2532]. The estate of an intestate, in default of a father and mother, shall go, first to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

Section 635. Those of half-blood. How to inherit.

[2533]. Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come

to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Section 636. In cases not herein provided for, descent to be according to common law.

[2534]. In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

Section 637. All who inherit, to do so as tenants in common.

[2535]. Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in proportion to their respective shares or rights.

ADVANCEMENT.

Section 638. By settlement or portion to child, how reckoned, and effect of.

[2536]. If any child of an intestate shall have been advanced by him in his life-time, by settlement or portion of real or personal estate, or both of them, the value thereof shall be reckoned, for the purpose of this section, only as part of the real and personal estate of such intestate descendible to his heirs, and to be distributed to his next of kin, according to law; and, if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as herein reckoned, then such child and his descendants shall be excluded from any share of the real and personal estate of the intestate.

Section 639. When not equal to share of estate.

[2537]. In cases where such advancement is not equal to the share that such child or relative, and his descendants, shall be entitled to receive, they shall be entitled to receive so much of the real and personal estate as shall be sufficient to make all the shares of the heirs in such real and personal estate and advancement to be as nearly equal as possible.

Section 640. Value of such advancement, how ascertained.

[2538]. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was ac-

known by the person receiving the same by any receipt, in writing, specifying the value; if no such written evidence exists, then such value shall be estimated according to its value at the time of advancing such money or property.

Section 641. Maintenance, education, etc. not to be taken as advancement.

[2539]. The maintaining, educating or giving money to a child or heir, without a view to a portion or settlement in life, shall not be an advancement within the meaning of this act.

CONSTRUCTION.

Section 642. Of term "real estate."

[2540] The term "real estate," as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner, other than by lease for years and estate for the life of another person.

Section 643. Of term "inheritance."

[2541]. The term "inheritance," as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act.

Section 644. Where person described as "living."

[2542]. Whenever, in any part of this act, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and, when any person is described as having died, it shall be understood that he died before the intestate.

Section 645. Of expression "come on part of father" or "on part of mother."

[2543]. The expression used in this act, "where the estate shall have come to the intestate on the part of the father," or "mother," as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent. *Rev. Stat., chap. 49.*

HEIRS AT LAW MAY BE MADE BY DECLARATION IN WRITING.

Section 646. Heir at law may be made by declaration in writing.

[2544]. When any person may desire to make a person his heir at law, it shall be lawful to do so by a declaration in writing in favor of such person, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this state.

Section 647. Declaration must be recorded before of effect.

[2545]. Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made may reside. *Act Jan. 12, 1853.*

CHAPTER LXV.

INDIAN STATUTES OF DESCENT AND DISTRIBUTION.

CHOCTAW STATUTE OF DESCENT AND DISTRIBUTION.

Section 648. Who inherit.

[12]. The property of all persons who die intestate or without a will, shall descend to his legal wife, or husband and their children; and in case such deceased person has no wife or husband nor children, his or her grandchildren (if any) shall inherit the estate; and in case there is no grandchild, the father or mother of such deceased person, or either of them shall heir the estate; and in case such deceased person has neither wife nor husband, nor children or grandchildren, or father or mother, his or her estate shall go to his or her brothers and sisters, and if none to their lawful children. Should there be none of the above mentioned relatives to intestate deceased person, the estate shall descend to the half brothers and sisters of the deceased person and to their legal issue. (From page 151 Durant's Code, 1894.) (Superseded by act of April 28, 1904, making the laws of Descent and Distribution of Arkansas in force in the Indian Territory applicable to the persons and estates of Indian and Freedmen.)

CHICKASAW STATUTE OF DESCENT AND DISTRIBUTION THAT HAS BEEN IN FORCE SINCE 1876.

AN ACT in relation to the descent of property.

Section 649. Descent—who inherit.

[1]. Be it enacted by the Legislature of the Chickasaw Nation, that from and after the passage of this Act, the property of all persons who die intestate or without a will, shall descend to the legal wife or husband, and their children.

Section 650. Who inherit.

[2]. Be it further enacted, that in case such deceased person has neither wife, nor husband, nor children his or her grandchildren (if any), shall inherit the estate.

Section 651. Who inherit.

[3]. Be it further enacted, that in case there be no grandchildren, then the brother or sister shall inherit the estate, and the next in kin shall be the father and mother, or either of them.

Section 652. Who inherit.

[4]. Be it further enacted, that in case such person had neither wife nor husband, children or grandchildren, brother or sister, father or mother, then the property shall descend to the half brothers and sisters of the deceased and their legal issue.

Approved October 12, 1876.

R. F. OVERTON,
Governor.

(Superseded by Act of Congress of April 28, 1904, extending the laws of Arkansas to the persons and estates of Indians and Freedmen.)

CHEROKEE STATUTE OF DESCENT AND DISTRIBUTION—DESCENT
OF PROPERTY.

Section 653. Who inherit.

[Section 518 of the Laws of the Cherokee Nations of 1892]. Whenever any person shall die possessed of property not devised, the same shall descend in the following order, to-wit:

1st. In equal parts to the husband or wife, and the children of such intestate, and their descendants; the descendants of a deceased child, or grandchild, to take the share of the deceased parent equally among them.

Section 654. Who inherit.

[2nd]. To the father and mother equally, or to the survivor of them.

Section 655. Who inherit.

[3rd]. In equal parts to the brothers and sisters of such intestate, and their descendants; the descendants of brothers and sisters, to take the share of the deceased parent equally among them.

Section 656. Who inherit.

[4th]. When there are none of the foregoing persons to inherit, the property of such deceased person shall go to his next or kin by blood. Kindred of the whole and half blood, in the same degree, shall inherit equally.

Section 657. Who inherit.

[5th]. The property of intestates, who have no surviving relative to inherit as above, shall escheat to the treasury of the Nation, to be placed to the credit of the orphan fund.

(Probably this statute never controlled descent of lands of allottees. See Secs. 124 to 125a.)

CREEK STATUTE OF DESCENT AND DISTRIBUTION.

Section 658. Who inherit.

[6]. Be it further enacted that if any person die, without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property.

Section 659. Who inherit.

[8]. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner.

(This is the Statute of Descent and Distribution recognized by the Supreme Court of Oklahoma. Some lawyers are of opinion that a subsequent statute was adopted and superseded these provisions. The adoption of the subsequent statute involves a question of fact upon which it is difficult to obtain satisfactory evidence.)

CHAPTER LXVI.

DOWER.

(Put in force in Indian Territory, May 2, 1890, made applicable to persons and estates of Indian and Freedmen by act of April 28, 1904, and repealed upon the admission of Oklahoma to Statehood, November 16, 1907.) (M. D. 1884.)

Section 660. Widow's dower in lands.

[2571]. A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. *Kirby v. Vantrece*, 26 Ark. 368; *Tate v. Jay*, 31 Ark. 576; *Pennington v. Yell*, 11 Ark. 212; *Webb v. Smith*, 40 Ark. 17; *Watson v. Billings*, 38 Ark. 278; *Miller v. Gibbons*, 34 Ark. 212; *Livingston v. Cochran*, 33 Ark. 296; *Cockrill v. Armstrong*, 31 Ark. 580; *Pillow v. Wade*, 31 Ark. 678; *Countz v. Marklinge*, 30 Ark. 17; *Drewry v. Montgomery*, 28 Ark. 256; *Tiner v. Christian*, 27 Ark. 306; *Apperson v. Bolton*, 29 Ark. 418; *Rockafellow v. Peay*, 40 Ark. 69; *McWhirter v. Roberts*, 40 Ark. 283.

Section 661. Widow of alien to have dower.

[2572]. The widow of an alien shall be entitled to dower of the estate of her husband in the same manner as if such alien had been a native-born citizen of this state.

Section 662. Lands exchanged.

[2573]. If a husband seized of an estate of inheritance in lands exchange it for other lands, his widow shall not have dower of both, but shall make her election to be endowed of the lands given or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

Section 663. Mortgage not to effect widow's dower.

[2574]. Where a person seized of an estate of inheritance in land shall have executed a mortgage of such estate before marriage, his widow shall nevertheless be entitled to dower

out of the lands mortgaged as against every person, except the mortgagee and those claiming under him.

Section 664. Purchase money mortgage superior to dower.

[2575]. Where a husband shall purchase lands during coverture, and shall mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to her dower as against all other persons. *Birnie v. Main*, 29 Ark. 591.

Section 665. Dower in surplus over mortgage.

[2576]. When, in such case, the mortgagee, or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged to be sold, either under a power contained in the mortgage or by virtue of the decree of a court of chancery, and any surplus shall remain after the payment of the moneys due on such mortgage and the costs and charges of the sale, such widow shall be entitled to the interest or income of one-third part of such surplus for her life as her dower.

Section 666. Dower does not attach to certain lands.

[2577]. A widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he have acquired an absolute estate therein during the marriage.

Section 667. Divorce for misconduct bars dower.

[2578]. In case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

Section 668. Conveyance in lieu of dower.

[2579]. When an estate in land shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of erecting a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim for dower of such wife in any land of the husband.

Section 669. Assent in such case, how given.

[2580]. The assent of the wife to such jointure shall be evinced, if she be of full age, by her becoming a party

to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian in such conveyance.

Section 670. How assent may bar dower.

[2581]. Any pecuniary provision that shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to by such wife, as above provided, be a bar to any right or claim of dower of such wife in all the lands of her husband.

Section 671. Cases in which wife may elect.

[2582]. If before her marriage, but without her assent, or if, after her marriage, land shall be given or assured for the jointure of a wife, or a pecuniary provision be made for her in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the land of her husband, but she shall not be entitled to both.

Section 672. Cases in which wife may elect.

[2583]. If land be devised to a woman, or a pecuniary or other provision be made for her by will in lieu of her dower, she shall make her election whether she will take the land so devised or the provision so made, or whether she will be endowed of the lands of her husband.

Section 673. Cases in which wife may elect.

[2584]. When a woman shall be entitled to an election under either of the two last preceding sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.

Section 674. When provision in lieu of dower forfeited.

[2585]. Every jointure, devise and pecuniary provision, in lieu of dower, shall be forfeited by the woman for whose benefit it shall be made, in the same cases in which she would forfeit her dower; and, upon such forfeiture, any estate so conveyed for jointure, and every pecuniary provision so made, shall immediately vest in the person, or his legal representatives, in whom they would have vested, on the determination of her interest therein, by the death of such woman.

Section 675. Husband's conveyance not to bar widow's dower.

[2586]. No act, deed or conveyance, executed or performed by the husband without the assent of his wife, evinced by the acknowledgment thereof in the manner required by law, shall pass the estate of a married woman; and no judgment or decree confessed or recovered against him, and no laches, default, covin or crime of the husband shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.

Section 676. May tarry in mansion house.

[2587]. A widow may tarry in the mansion or chief dwelling-house of her husband for two months after his death, whether her dower be sooner assigned her or not, without being liable to any rent for the same; and, in the meantime, she shall have a reasonable sustenance out of the estate of her husband. See art. IX, sec. 6, Const.

Section 677. May tarry in mansion house.

[2588]. If the dower of any widow is not assigned and laid off to her within two months after the death of her husband, she shall remain and possess the mansion or chief dwelling-house of her late husband, together with the farm thereto attached, free of all rent, until her dower shall be laid off and assigned to her. *Trimble v. James*, 40 Ark. 393; *Mock v. Pleasants*, 34 Ark. 63.

Section 678. Commissioners to lay off dower.

[2589]. In all assignments of dower to any widow, it shall be the duty of the commissioners who may be appointed to lay off the dower (if the estate will permit without essential injury) so to lay off the dower in the lands of the deceased husband that the usual dwelling of the husband and family shall be included in such assignment of dower to the widow. *Rev. Stat., chap. 52, secs. 1-19.*

Section 679. Commissioners to lay off dower.

[2590]. The commissioners appointed to lay off dower in the lands of the deceased husband shall, at the request of the widow to be endowed, lay off the same on any part of the lands of the deceased, whether the same shall include the usual dwelling of the husband and family or not; *provided*, the same can be done without essential injury to such estate. *Act Jan. 15, 1857.*

Section 680. Dower in estate and choses in action.

[2591]. A widow shall be entitled, as part of her dower, absolutely and in her own right, to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debt whereof the husband died seized or possessed. *Hill v. Mitchell*, 5 Ark. 608; *Mulhollan v. Thompson*, 13 Ark. 232; *Meniffee v. Meniffee*, 8 Ark. 9; *James v. Marcus*, 18 Ark. 421; *McClure v. Owens*, 32 Ark. 443; *Street v. Saunders*, 27 Ark. 554; *Gibson v. Dowell*, 42 Ark. 164. *Rev. Stat., chap. 52, sec. 20; act Feb. 21, 1859, sec. 1, and act March 8, 1867.*

Section 681. Dower in lands and personalty when no children.

[2592]. If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which such husband died seized, and one-half of the personal estate, absolutely and in her own right. *Brown v. Collins, ad.*, 14 Ark. 421.

Section 682. Widow's dower, at her death, descends, how.

[2593]. At the death of any widow who hath dower in land, such property shall descend in accordance with the will of the deceased husband, or, if the husband died intestate, then to descend in accordance with the law for the distribution of intestate's estate.

Section 683. Devise of real estate to the wife deemed in lieu of dower.

[2594]. If any husband shall devise and bequeath to his wife any portion of his real estate of which he died seized, it shall be deemed and taken, in lieu of dower, out of the estate of such deceased husband, unless such testator shall, in his will, declare otherwise. *Apperson v. Bolton*, 29 Ark. 418.

Section 684. Widow has her election in such cases.

[2595]. In cases of provision made by will for widows, in lieu of dower, such widow shall have her election to accept the same or be endowed of the lands and personal property of which her husband died seized.

Section 685. Widow may elect.

[2596]. If a widow, for whom provision has been made by will, elect to be endowed of the lands and personal

property of which her husband died seized, she shall convey, by deed of release and quit-claim, to the heirs of such estate the land so to her devised and bequeathed, which deed shall be acknowledged or proven and recorded as other deeds for real estate are required to be acknowledged or proven and recorded.

Section 686. Renunciation—how evidenced.

[2597]. Such renunciation of the devise or bequest by deed, as provided for in the last preceding section, shall be deemed a sufficient notice of the renunciation of the interest of such widow in all the benefits she might claim by such will in the lands of such deceased husband.

Section 687. Renunciation—when must be filed.

[2598]. Such renunciation by deed shall be executed within eighteen months after the death of such husband, or the widow will be deemed to have elected to take the devise and bequest contained in such will. *Rev. Stat., chap. 52, secs. 21-27.*

Section 688. Widow may relinquish dower and take absolutely a child's share.

[2599]. The widow of any deceased person, who shall file in the office of the clerk of the court of probate, or with the probate court of the proper county, a relinquishment of her right of dower in and out of the estate of her deceased husband, shall be entitled to receive of the estate of which her said husband died seized and possessed, whether real, personal or mixed, a portion or share thereof, absolutely in her own right, equal to that of a child, which shall be set aside and delivered to her as now provided by law for dower.

Section 689. Relinquishment—how made—when and where to be filed.

[2600]. Said relinquishment shall be in writing and acknowledged before the clerk or some justice of the peace, and filed within sixty days after the grant of letters of administration on the estate of the decedent.

Section 690. Laws vesting certain estates in widow and children not repealed.

[2601]. Nothing herein contained shall be so construed as to repeal any law vesting estates worth less than three hundred dollars in the widow and children of deceased persons. *Act Nov. 29, 1862.*

Section 691. Widow shall be endowed of all the lands.

[2602]. A widow shall be endowed of lands sold in the life-time of the husband without her consent in legal form against all creditors of the estate. *Tate v. Jay*, 31 Ark. 576.

Section 692. Duty of heir to assign dower.

[2603]. It shall be the duty of the heir at law of any estate, of which the widow is entitled to dower, to lay off and assign such dower as soon as practicable after the death of the husband of such widow. *Hill v. Mitchell*, 5 Ark. 608; *Morrill v. Meniffee, Ib.*, 629; *Meniffee v. Meniffee*, 8 Ark. 9; *Hill v. Mitchell, supra*; *Trimble v. James*, 40 Ark. 393; *Jacks v. Dyer*, 31 Ark. 334; *Reed v. Ash*, 30 Ark. 775.

Section 693. Proceedings for assignment of dower.

[2604]. If such dower assigned by the heir at law be accepted by the widow, the heir at law shall make a statement of such assignment, specifying what lands have been assigned, and the acceptance of such widow shall be indorsed thereon; which statements and specification of dower, and acceptance thereof, shall be proved or acknowledged by both parties, and filed with and recorded by the clerk of the court of probate, which will then be a sufficient assignment of dower, and shall bar any further demand for dower in the property specified in the statement of dower.

Section 694. Minor heirs in such cases to act by their guardians.

[2605]. If the heir to any estate be a minor, he shall act, in the assignment of dower, by his guardian. *Rev. Stat., chap. 52, secs. 28-31.*

PROCEEDINGS FOR ASSIGNMENT OF DOWER.**Section 695. How widow may proceed when dower not assigned in due time—form of petition for dower.**

[2606]. If dower be not assigned to the widow within one year after the death of her husband, or within three months after demand made therefor, she may file in the court of probate, or in the clerk's office thereof, in vacation, a written petition in which a description of the lands in which she claims dower, the names of those having an interest therein and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the allotment of dower; and, thereupon,

all persons interested in the property shall be summoned to appear and answer the petition on the first day of the next term of the court. *McWhirter v. Roberts*, 40 Ark. 283; *Livingstone v. Cochran*, 33 Ark. 296; *Stidham v. Mathews*, 29 Ark. 650. *Rev. Stat.*, chap. 52, sec. 32; *Civil Code*, sec. 538.

Section 696. When petition stands for hearing—order thereon.

[2607]. Upon a summons being served upon all who have an interest in the property ten days before the commencement of the term, the court may make an order for the allotment of dower in accordance with the law of dower. *Rev. Stat.*, chap. 52, sec. 39; *Civil Code*, sec. 539.

Section 697. Constructive service.

[2608]. Parties interested may be constructively summoned as provided by law in other cases.

Section 698. Verification of pleading not required.

[2609]. No verification shall be required to the petition or answer.

Section 699. Who may be admitted to defend.

[2610]. If the petition is filed against infants, married women or persons of unsound mind, the guardian, committee or husband may appear and defend for them and protect their interests; and, if they do not, the court shall appoint some discreet person for that purpose. *Civil Code*, secs. 540, 543 and 548.

Section 700. A party may contest right of petitioner by answer—questions, how tried.

[2611]. If any person summoned, as provided in sections 2606 and 2607, desires to contest the right of the petitioner, or the statements in the petition, he shall do so by a written answer, and the questions of law and fact thereupon arising shall be tried and determined by the court upon the petition, answer, exhibits and other testimony. *Rev. Stat.*, chap. 52, sec. 37; *Civil Code*, sec. 541.

Section 701. Commissioners to be appointed and their duties.

[2612]. The court shall, in all cases, when it orders and decrees dower to any widow, appoint three commissioners, of the vicinity, who shall proceed to the premises in question, and, by survey and measurement, lay off and designate, by

proper metes and bounds, the dower of such widow in accordance with the decree of the court.

Section 702. Report of commissioners.

[2613]. Such commissioners shall make a detailed report of their proceedings to the next term of the court. *Rev. Stat., chap. 52, secs. 40, 41.*

Section 703. Proceedings on report.

[2614]. Upon such report being returned the court may confirm or set the same aside, or remand it to the commissioners for correction. If approved by the court, said report shall be entered of record and be conclusive on the parties. *Rev. Stat., chap. 52, sec. 41; Civil Code, sec. 545.*

Section 704. Order when lands will not admit of division.

[2615]. In cases where lands or tenements will not admit of division, the court, being satisfied of that fact, or on the report of the commissioners to that effect, shall order that such tenements or lands be rented out, and that one-third part of the proceeds be paid to such widow, in lieu of her dower in such lands and tenements. *Rev. Stat., chap. 52, sec. 42.*

Section 705. Widow may recover and defend possession of her dower.

[2616]. If the land assigned and laid off to any widow be deforced from her possession, she shall have her action for the recovery of possession thereof, with double damages for such deforcement; or she may sue for the damages alone, and recover double the actual damages sustained, from time to time, until she be put in possession of her dower, held by such deforcer or detainer.

Section 706. Heir's alienation of land not to affect widow's dower.

[2617] If the heir alien lands of which a widow is entitled to dower, she shall still be decreed her dower in such lands so aliened, in whose hand soever the land may be.

Section 707. Of the crop growing on the land assigned as dower at widow's death.

[2618]. A widow may bequeath the crop in the ground of the land held by her in dower at the time of her death. If she die intestate, it shall go to her administrator. *Rev. Stat., chap. 52, secs. 21-32, 46-49.*

Section 708. Costs to be apportioned, etc.

[2619]. The cost of allotting dower shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong. *Civil Code, sec. 547.*

CHAPTER LXVII.

SUCCESSION.

(Wilson Statutes of 1903, Chap. 86, Article 4.)

Section 709. Succession defined.

Succession is the coming in of another to take the property of one who dies without disposing of it by will. [W. S. 6893.]

Section 710. All property passes to heirs.

The property, both real and personal, of one who dies, without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purpose of administration. Cal. Civil Code, sec. 1384; *Burton's Estate*, 93 Cal. 463, 29 Pac. 224; *Maddox v. Russell*, 109 Cal. 417, 42 Pac. 139. (W. S. 6894).,

Section 711. Order of succession.

When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the chapter on probate court, subject to the payment of his debts, in the following manner:

First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issues of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living,

or to the child living, and the issue of the deceased child or children by right of representation. [An illegitimate child is entitled to a share in its mother's estate the same as a legitimate child. *Estate of Wardell*, 57 Cal. 484.]

Second. If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband nor wife, the estate must go to the father. *Lynch v. Lynch* (Cal.), 64 Pac. 284.

Third. If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survive, she takes an equal share with the brothers and sisters. [The word children does not include grandchildren, but is confined to the immediate offspring of the deceased brother or sister. *Estate of Donahue*, 36 Cal. 329; *Estate of Curry*, 39 Cal. 52.]

Fourth. If the decedent leave no issue, nor husband, nor wife, nor father, and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

Fifth. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife. [The statute comprehends no difference between brothers and sisters of the whole and half blood. *Lynch v. Lynch* (Cal.), 64 Pac. 284.]

Sixth. If the decedent leave no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those claiming through the nearest ancestors must be preferred to those claiming through an ancestor more remote. *Pearson's Estate*, 110 Cal. 524, 42 Pac. 960. However:

Seventh. If the decedent leave several children, or one child and the issue of one or more children, and any such surviv-

ing child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. *Estate of Donahue*, 39 Cal. 329.

Eight. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

Ninth. If the decedent leave no husband, wife, or kindred, the estate escheats to the Territory for the support of common schools. *State v. District Court* (Mont.), 65 Pac. 12, Cal. Civil Code, sec. 1396. (W. S. 6895).

Section 712. Dower and curtesy abolished.

Dower and curtesy are abolished. (W. S. 6896).

Section 713. Inheritance by illegitimate child.

Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father after such marriage acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law or dissolved by divorce, are legitimate. (W. S. 6897).

Section 714. Inheritances from illegitimate child.

If an illegitimate child, who has not been acknowledged, or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law. (W. S. 6898).

Section 715. Each generation is a degree.

The degree of kindred is established by the number of generations, and each generation is called a degree. (W. S. 6899).

Section 716. Lineal and collateral.

The series of degrees form the line; the series of degrees between persons who descend from one another, is called direct or lienal consanguinity; and the series of degrees between persons who did not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity. (W. S. 6900).

Section 717. Ascending and descending.

The direct line is divided into a direct line descending and the direct line ascending. The first is that which connects the ancestor with those who descend from him. The second is that which connects a person with those from whom he descends. (W. S. 6901).

Section 718. Direct line degree.

In the direct line there are as many degrees as there are generations. Thus the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons. (W. S. 6902).

Section 719. Collateral degree.

In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus brothers are related in the second degree, uncle and nephew in the third degree, cousins germane in the fourth degree, and so on. (W. S. 6903).

Section 720. Kindred of the half-blood.

Kindred of the half blood inherit equally with

those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance. Cal. Civil Code, Sec. 1395; *Smith's Estate*, 131 Cal. 433, 63 Pac. 729. (W. S. 6904).

Section 721. Advancements part of share.

Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent. (W. S. 6905).

Section 722. Excess not refunded.

If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent. (W. S. 6906).

Section 723. Advancement defined.

All gifts and grants are made as advancements if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing, as such by the child or other successor or heir. (W. S. 6907).

Section 724. Express value governs.

If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise it must be estimated according to its value when given, as nearly as the same can be ascertained. (W. S. 6908).

Section 725. Representation.

If any child or other lineal descendant receiving advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division

and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them. (W. S. 6909).

Section 726. Inheritance by representation.

Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents. (W. S. 6910).

Section 727. Aliens may take.

Aliens may take in all cases, by succession, as well as citizens; and no person, capable of succeeding under the provisions of this title, is precluded from such succession by reason of the alienage of any relative. (W. S. 6911).

Section 728. Escheated estates.

If there is no one capable of succeeding under the preceding sections, and the title fails from a defect of heirs, the property of a decedent devolves and escheats to the Territory; and an action for the recovery of such property, and to reduce it into the possession of the Territory, or for its sale and conveyance may be brought by the district attorney in the district court of the county or judicial subdivision in which the property is situated. (W. S. 6912).

Section 729. Real property subject to charges.

Real property passing to the Territory under the preceding section, whether held by the Territory or its grantees, is subject to the same charges and trusts to which it would have been subject if it had passed by succession. Cal. Civil Code, Sec. 1406; *People v. Roach*, 76 Cal. 294, 18 Pac. 407. (W. S. 6913).

Section 730. Liabilities of heirs.

Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by Chapter 18. (W. S. 6914).

CHAPTER LXVIII.

AN ACT entitled an Act to amend section 6261 of the Statutes of Oklahoma of 1893 entitled: "Succession."

Be it Enacted by the People of the State of Oklahoma:

Section 731. Succession—amendment to law of.

[1]. That Section 6261 of the Statutes of Oklahoma of 1893, be amended so as to read as follows: Section 6261. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:

First: If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living and the lawful issue of one or more deceased children, one-third to the surviving husband and wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation; *Provided*, if decedent shall have married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

Second: If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or if he leave both

father and mother to them in equal shares. If there be no father, then one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares. *Provided*; in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation.

Third: If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor.

Fourth: If the decedent leave no issue nor husband, nor wife, nor father and no brother or sister is living at the time of his death, the estate goes to the mother to the exclusion of the issue, if any, of the deceased brothers or sisters.

Fifth: If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother nor brother, nor sister, the whole estate goes to the surviving husband or wife.

Sixth: If the decedent leave no issue, nor husband, nor wife, and no father nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degrees, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote, however.

Seventh: If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

Eighth: If, at the death of such child, who dies under age, not having been married, all the other children of his parents

are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise, they take according to the right of representation.

Ninth: If the decedent leave no husband, wife or kindred, the estate escheats to the State for the support of common schools.

Section 732. Repeal of conflicting provisions.

Section 732. All acts, or parts of acts, in conflict with this act, be and the same are hereby repealed.

Passed by the Senate, March 2, 1909.

J. C. GRAHAM,

President Pro Tempore of the Senate.

Passed by the House of Representatives, March 11, 1909.

BEN F. WILSON,

Speaker of the House of Representatives.

Approved, March 20, 1909.

C. N. HASKELL,

Governor.

(This act became effective ninety days after its approval by the Governor.)

CHAPTER LXIX.

RECORDING ACT.

AN ACT providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes. Superseded by Oklahoma Statutes, November 16th, 1907. (32 Stat. 841).

Section 733. Mansfield's Digest, chapter 27 extended over Indian Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress: *Provided,* That the clerk or deputy clerk of the United States court of each of the courts of said Territory shall be ex officio recorder for his district and perform the duties required of recorder in the chapter aforesaid, and use the seal of such court in cases requiring a seal, and keep the records of such office at the office of said clerk or deputy clerk.

Section 734. Recording and filing of instruments when authorized.

It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, and other instruments of writing of or concerning lands, tenements, goods, or chattels; and where such instruments are for a period of time limited on the face of the instrument they shall be filed and indexed, if desired by the holder thereof, and such filing for the period of twelve months from the filing thereof shall have the same effect in law as if recorded at length. The fees for filing, indexing, and cross indexing such instruments shall be twenty-five cents, and for recording shall be as set forth in section thirty-two hundred and forty-three of Mansfield's Digest of eighteen hundred and eighty-four.

That the said clerk or deputy clerk of such court shall re-

ceive as compensation as such ex officio recorder for his district all fees received by him for recording instruments provided for in this Act, amounting to one thousand eight hundred dollars per annum or less; and all fees so received by him as aforesaid amounting to more than the sum of one-thousand eight hundred dollars per annum shall be accounted to the Department of Justice, to be applied to the permanent school fund of the district in which said court is located.

Section 735. Instruments previously recorded.

Such instruments heretofore recorded with the clerk of any United States court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute.

That wherever in said chapter the word "county" occurs there shall be substituted therefor the word "district," and wherever the words "State" or "State of Arkansas" occur there shall be substituted therefor the words "Indian Territory," and wherever the words "clerk" or "recorder" occur there shall be substituted the words "clerk or deputy clerk of the United States court."

All acknowledgments of deeds of conveyance taken within the Indian Territory shall be taken before a clerk or deputy clerk of any of the courts in said Territory, a United States commissioner, or a notary public appointed in and for said Territory.

All instruments of writing the filing of which is provided for by law shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which said recording districts are bounded as follows:

Approved February 19, 1903.

(The remaining sections give boundaries of recording districts.)

CHAPTER LXX.

(CHAPTER XXVII. M. D. 1884.)

CONVEYANCES OF REAL ESTATE.

Put in force in Indian Territory, February 19, 1903, and superseded by Oklahoma Statutes, November 16, 1907.

Section 736. Lands may be alienated by deed—words “grant, bargain and sell” equivalent to express warranty, of what.

[639]. All lands, tenements and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin, and the words “*grant, bargain and sell*” shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed. *Brodie & King v. Watkins and wife*, 31 Ark. 319; *Winston v. Vaughan*, 22 Ark. 72; *Floyd v. Ricks*, 14 Ark. 286; *Cloys v. Beebe, Ib.*, 489.

Section 737. Breaches may be assigned as upon express covenant.

[640]. The grantee, his heirs or assigns, may in any action assign breaches as if such covenants were expressly inserted.

Section 738. Conveyance in fee simple.

[641]. The term or word “heirs,” or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; but all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deed.

Section 739. Subsequently acquired title by grantor inures to benefit of grantee.

[642]. If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute,

or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance. *Cocke v. Brogan & Thorn*, 5 Ark. 693; *Holland v. Rogers*, 33 Ark. 251; *Watkins & Trapnall v. Wassell*, 15 Ark. 73; *Jones v. Green*, 41 Ark. 363.

Section 740. A fee tail an estate for life.

[643]. In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance.

Section 741. One may convey notwithstanding adverse possession.

[644]. Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.

Section 742. Term "real estate" defined.

[645]. The term "*real estate*," as used in this act, shall be construed as co-extensive in meaning with "lands, tenements and hereditaments," and as embracing all chattels real.

Section 743. Wills not embraced by this act.

[646]. This act shall not be construed so as to embrace last wills and testaments.

Section 744. Grant of lands to two or more constitutes them tenants in common.

[647]. Every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be in tenancy in common, unless expressly declared in such grant or devise to be a joint tenancy. *Cockrill v. Armstrong*, 31 Ark. 580.

Section 745. Married woman may convey her real estate, how.

[648]. A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed. *Roberts v. Wilcoxson*, 36 Ark. 355; *Ward v. Ward, Ib.*, 586; *Chrisman v. Partee*, 38 Ark. 31; *Felkner v. Tighe*, 39 Ark. 357; *Donahue v. Mills*, 41 Ark. 421; *Tiller v. McCoy*, 38 Ark. 91; *Shryock v. Cannon*, 39 Ark. 434; *Harrod v. Meyers*, 21 Ark. 592; *Watson v. Billings*, 38 Ark. 278; *Rockafellow v. Oliver*, 41 Ark. 169.

Section 746. May relinquish her dower, how.

[649]. A married woman may relinquish her *dower* in any of the real estate of her husband by joining with him in a deed of conveyance thereof, and acknowledging the same in the manner hereafter prescribed. *Watson v. Billings*, 38 Ark. 278; *Witter v. Biscoe et al., trustees, etc.*, 13 Ark. 422; *McDaniel v. Grace et al.*, 15 Ark. 465; *Meyer v. Gossett*, 38 Ark. 377; *Pillow v. Wade and wife*, 31 Ark. 678; *Countz v. Markling*, 30 Ark. 17; *Dutton v. Stuart*, 41 Ark. 101.

Section 747. Witnesses to conveyance.

[650]. Deeds and instruments of writing for the conveyance of real estate shall be executed in the presence of two disinterested witnesses, or, in default thereof, shall be acknowledged by the grantor in the presence of two such witnesses, who shall then subscribe such deed or instrument in writing for the conveyance of such real estate; and when the witnesses do not subscribe the deed or instrument of writing aforesaid at the time of the execution thereof, the date of their subscribing the same shall be stated with their signatures. *Cocke v. Brogan & Thorne*, 5 Ark. 693; *McDaniel v. Grace et al.*, 15 Ark. 475; *Jackson v. Allen*, 30 Ark. 110. *Rev. Stat., chap. 31, secs. 1-12.*

Section 748. Proof or acknowledgment of deed.

[651]. The proof or acknowledgment of every deed or instrument of writing for the conveyance of any real estate, shall be taken by some one of the following courts or officers:

First. When acknowledged or proven within this state before the supreme court, the circuit court, or either of the judges

thereof, or the clerk of any court of record, or before any justice of the peace, or notary public. *Briscoe v. Byrd*, 15 Ark. 655.

Second. When acknowledged or proven without this state and within the United States or their territories, before any court of the United States or of any state or territory, having a seal, or the clerk of any such court, or before any notary public, or before the mayor of any city or town, or the chief officer of any city or town having a seal, or before a commissioner appointed by the governor of this state. *Worsham v. Freeman*, 34 Ark. 55.

Third. When acknowledged or proven without the United States, before any court of any state, kingdom or empire having a seal, or any mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country who, by the laws of such country, is authorized to take probate of the conveyance of real estate of his own country, if such officer has, by law, an official seal. *Ib.*, sec. 13, act April 7, 1873, sec. 1, and act Dec. 19, 1846, sec. 1, as amended by act Dec. 14, 1874.

Section 749. Acknowledgment to be attested, how.

[652]. In cases of acknowledgment or proof of deeds or conveyances of real estate, taken within the United States or territories thereof, when taken before any court or officer having a seal of office, such deed or conveyance shall be attested under such seal of office; and if such officer have no seal of office, then under the official signature of such officer. *Worsham v. Freeman*, 34 Ark. 55.

Section 750. Acknowledgment to be attested, how.

[653]. In all cases of deeds and conveyances proven or acknowledged without the United States or their territories, such acknowledgment or proof must be attested under the official seal of the court or officer before whom such probate is had.

Section 751. Certificate of.

[654]. Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the real estate of her husband, shall grant a certificate thereof and cause such certificate to be indorsed on said deed, instrument, conveyance or relinquishment of dower,

which certificate shall be signed by the clerk of the court where probate is taken in court, or by the officer before whom the same is taken and sealed, if he have a seal of office. *Trammell v. Thurmoud*, 17 Ark. 203; *Ferguson v. Peden*, 33 Ark. 150; *Little v. Dodge*, 32 Ark. 453; *Sonfield v. Thompson*, 42 Ark. 46; *Meyer v. Gossett*, 38 Ark. 377; *Holt v. Moore*, 37 Ark. 148.

Section 752. Proof of identity of grantor or witness.

[655]. When any grantor in any deed or instrument that conveys real estate, or whereby any real estate may be affected in law or equity, or any witness to any like instrument, shall present himself before any court or other officer for the purpose of acknowledging or proving the execution of any such deed or instrument as aforesaid, if such grantor or witness shall be personally unknown to such court or officer, his identity and his being the person he purports to be on the face of such instrument of writing, shall be proven to such court or officer, which proof may be made by witnesses known to the court or officer, or the affidavit of such grantor or witness, if such court or officer shall be satisfied therewith; which proof or affidavit shall also be indorsed on such deed or instrument of writing.

Section 753. Acknowledgment by grantor.

[656]. The acknowledgment of deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected in law or equity, shall be by the grantor appearing in person before such court or officer having the authority by law to take such acknowledgment, and stating that he had executed the same for the consideration and purposes therein mentioned and set forth. *Johnson v. Godden*, 33 Ark. 600; *Martin v. O'Bannon*, 35 Ark. 62; *Ford v. Burks*, 37 Ark. 91; *Connor v. Abbott*, 35 Ark. 365.

Section 754. Proof of.

[657]. When any such deed or instrument is to be proven, it shall be done by one or more of the subscribing witnesses personally appearing before the proper court or officer, and stating on oath that he or they saw the grantor subscribe such deed or instrument of writing, or that the grantor acknowledged in his or their presence that he had subscribed and executed such deed or instrument for the purposes and consideration therein mentioned, and that he or they had subscribed the same as witnesses at the request of the grantor.

Section 755. How proved when witness is dead.

[658]. If any grantor has not acknowledged the execution of any such deed or instrument, and the subscribing witnesses be dead or can not be had, it may be proved by the evidence of the handwriting of the grantor, and of at least one of the subscribing witnesses, which evidence shall consist of the deposition of two or more disinterested persons swearing to each signature.

Section 756. Married women, conveyance and relinquishment of dower by.

[659]. The conveyance of real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question, or that she had signed the relinquishment of dower for the purposes therein contained, and set forth without compulsion or undue influence of her husband. *Little, trustee, v. Dodge, guardian, etc.*, 32 Ark. 453; *Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421; *Wentworth v. Clark*, 33 Ark. 432; *Shryock v. Cannon*, 39 Ark. 434; *Chaffe v. Oliver, Ib.*, 531; *Stidham v. Mathews*, 29 Ark. 650; *Beavers v. Baucum*, 33 Ark. 722; *Stillwell v. Adams*, 29 Ark. 346; *Magness v. Arnold*, 31 Ark. 103; *Scott v. Ward*, 35 Ark. 480; *Tubbs v. Gatewood*, 26 Ark. 128; *Russell v. Umphlet*, 27 Ark. 339.

Section 757. To be proved or acknowledged before recorded.

[660]. All deeds and other instruments in writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provisions of this act before they or any of them shall be admitted to record.

Section 758. Power of attorney to be recorded.

[661]. Every letter of attorney containing a power to convey any real estate as agent or attorney for the owner thereof, or execute as agent or attorney for another any deed or instrument in writing that shall convey any real estate, or whereby any real estate shall be affected in law or equity, shall be ack-

nowledged or proven and certified and recorded with any deed that such agent or attorney shall make in virtue of such letter of attorney. *Jones v. Green*, 41 Ark. 363.

Section 759. Power of attorney to be acknowledged.

[662]. Letters of attorney shall be proven or acknowledged before the same courts or officers that are authorized by this act to take probate of deeds conveying real estate.

Section 760. Power of attorney—how revoked.

[663]. No letter of attorney, duly acknowledged or proved, and certified as prescribed by this act, shall be revoked but by the maker of such letter of attorney or his legal representatives, which revocation shall be in writing, acknowledged or proved before the proper court or officer, and filed for record in the county or counties where such letter of attorney was intended to operate—all such letters of attorney shall be revoked and deemed void from the time of filing such revocations for record.

Section 761. Deed recorded and acknowledged admissible as evidence.

[664]. Every deed or instrument in writing conveying or affecting real estate which shall be acknowledged or proved and certified, as prescribed by this act, may, together with the certificate of acknowledgment, proof, or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby shall be situate, and when so recorded may be read in evidence without further proof of execution. *Simpson v. Montgomery*, 25 Ark. 365; *Wilson and wife v. Spring*, 38 Ark. 181; *Watson v. Billings, Ib.*, 278; *Dorr v. School District No. 26, etc.*, 40 Ark. 237.

Section 762. Lost deed.

[665]. If it shall appear at any time that any deed or instrument, duly acknowledged or proved and recorded as prescribed by this act, is lost or not within the power and control of the party wishing to use the same, the record thereof, or a transcript of such record certified by the recorder, may be read in evidence without further proof of execution.

Section 763. Acknowledgment and recording not conclusive evidence.

[666]. Neither the certificate of acknowledgment nor probate of any such deed or instrument, nor the record

or transcript thereof, shall be conclusive, but may be rebutted. *Rev. Stat. chap. 31.*

Section 764. Deed by Commissioner of State Lands.

[667]. Where, by law, the commissioner of state lands is required to execute any deed of conveyance or patent for any lands sold or granted by the state, such deed of conveyance or patent, when executed by such commissioner under his official seal, shall convey all the right and title of the state in and to said lands to the purchaser, and may be recorded in the office of the recorder of the proper county, and the original, or a duly certified copy of the same, taken from the record thereof, shall have the same effect as evidence as if such deed or patent had been acknowledged and recorded under the existing laws of this state. *Act Dec. 31, 1850.*

Section 765. Deeds of administrators, etc.—acknowledging and recording.

[668]. All deeds of conveyance made by administrators, executors, guardians and commissioners in chancery, and deeds made and executed by sheriffs of real estate sold under executions, duly made and executed, acknowledged and recorded, as required by law, and purporting to convey real estate, shall vest in the grantee, his heirs and assigns, a good and valid title, both in law and in equity, and shall be evidence of the facts therein recited, and of the legality and regularity of the sale of the lands so conveyed until the contrary be made to appear. *Hughes v. Watt, 26 Ark. 228.*

Section 766. Deeds as evidence.

[669]. Every deed so made, executed, acknowledged and recorded, or a certified copy thereof, under the seal of the recorder of the proper county, shall be received in evidence without further proof of its execution. *Act Jan. 12, 1853.*

Section 767. Recording constructive notice.

[670]. Every deed, bond, or instrument of writing, affecting the title in law or equity to any property, real or personal, within this state, which is or may be required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to indorse, on every such deed, bond,

or instrument, the precise time when the same is filed for record in his office.

Section 768. Deed not effective as to third person until recorded.

[671]. No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated. *Byers v. Engles*, 16 Ark. 543.

Section 769. Not to repeal certain provisions.

[672]. Nothing herein contained shall be construed to change, or in any manner affect, sections 4742, 4743 and 4744. *Act Dec. 19, 1846.*

DEFECTIVE RECORDING AND ACKNOWLEDGMENTS CURED.

Section 770. Curative provisions.

[673]. All deeds, bonds, mortgages or other conveyances of real estate, heretofore recorded, whether duly recorded or not, under the provisions of the law in force at the time of recording, shall not, after the passage of this act, be impeached for not being duly recorded, but shall have the same legal force and effect as if duly recorded in the first instance; saving, however, to all persons any lien or right, in law or equity, that such person may have prior to the passage of this act. *Act Jan. 5, 1843.*

Section 771. Curative provisions.

[674]. All conveyances or other instruments heretofore executed out of this state, under and by virtue of the "Chapters of the Digest," shall be held valid and binding as though the said "Chapters of the Digest" were in full force and effect at the time.

Section 772. Curative provisions.

[675]. The record of all such instruments shall be as valid as if the same had been acknowledged or executed according to law. *Act Feb. 25, 1873, secs. 5 and 6.*

Section 773. Curative provisions.

[676]. All conveyances heretofore made and executed in accordance with the so-called "Chapters of the digest," shall be equally valid and binding as if made and executed according to the laws actually in force at the time of making and executing the same; and no such conveyance or other instrument heretofore executed out of this state, shall be held to be invalid because the same was acknowledged before the judge of any court or a notary public.

Section 774. Curative provisions.

[677]. The record of all such instruments shall be as valid as if the same had been acknowledged or executed according to law. *Act March 7, 1873, secs. 1 and 2.*

Section 775. Curative provisions.

[678]. All acknowledgments of relinquishments of dower heretofore taken, in accordance with the "Chapters of the Digest," shall be as valid and binding as though the said "Chapters of the Digest" were in full force and effect at the time that the same were taken.

Section 776. Curative provisions.

[679]. The record of all instruments acknowledged as aforesaid shall be as valid as if the same had been acknowledged according to law. *Act April 10, 1873, secs. 1 and 2.*

Section 777. Curative provisions.

[680]. All acknowledgments of deeds and other instruments of writing, taken before the clerk of any court of record within this state, from the tenth day of July, 1868, to the date of the passage of this act, are hereby legalized and declared valid to all intents and purposes. *Act April 7, 1873, sec. 2.*

Section 778. Curative provisions.

[681]. All conveyances or other instruments of writing affecting real estate, heretofore acknowledged or proven

before a notary public out of this state, but within the United States, shall be held to be as valid and binding as if acknowledged or proven in pursuance of law. *Act Dec. 14, 1874.*

Section 779. Curative provisions.

[682]. All acknowledgments of deeds, mortgages and other instruments of writing, heretofore taken by judges of the county and probate courts in this state, are hereby declared to be as legal and binding as though such acknowledgments had been taken by an officer duly authorized by law to take the same. *Act March 6, 1877.*

Section 780. Curative provisions.

[683]. All deeds and other conveyances recorded prior to the first day of January, eighteen hundred and eighty-three, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective (excepting only cases where such conveyances shall have been executed by minors or insane persons). *Provided*, that the record of all such instruments shall be as valid as if they had been acknowledged and recorded according to law. *Act March 8, 1883, sec. 6.*

Section 781. Curative provisions.

[684]. All conveyances and other instruments of writing authorized by law to be recorded, or which have heretofore been recorded in any county in this state, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, or because such officer failed or omitted to attach his seal of office to such certificate, or attached to any certificate any seal not bearing the words or devices required by law, or otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form and bore proper seal. *Act March 14, 1883.*

CHAPTER LXXI.

REAL ESTATE CONVEYANCES, MORTGAGES AND CONTRACTS.

AN ACT regulating the conveyance of real property and mortgages thereon and contracts relating thereto, and repealing Article 1, of Chapter 21, entitled "Conveyances" and Chapter 82, entitled "Transfers" of the Oklahoma Statutes of 1893, and other acts and parts of acts. (Session Laws 1897, page 92; Wilson's Statutes, p. 324.)

Section 782. Who may hold mortgage and convey real estate.

[1]. All male persons of the age of twenty-one years, and all females of the age of eighteen years, and all persons who have been legally married of whatever age, and all corporations to the extent authorized by law, may take title to, hold, mortgage, convey or make any contract relating to real estate or any interest therein. (Wilson's Statutes, Sec. 877.) This section amended as follows by Act effective June 5, 1909:

Section 783. Amendment to section 782.

Section 1. That Section one (1) of Chapter (8) of the Session Laws of Oklahoma, 1897, is hereby amended to read as follows:

"Section 1. Male persons of the age of twenty-one years, and female persons of the age of eighteen years, being otherwise qualified thereto, and corporations to the extent and in the manner authorized by law, owning real estate in the State of Oklahoma may mortgage, convey, or otherwise dispose of, or make any contract relating to real estate or any interest therein; *Provided*, any persons of whatsoever age, who have been legally married and who are otherwise qualified, may dispose of and make contracts relating to real estate acquired after marriage." (Approved March 5, 1909, effective June 5, 1909.)

Section 784. Witnesses to conveyance not necessary.

[2]. No subscribing witness shall be necessary to the validity of any deed, mortgage, contract, lease, bond, or other instrument conveying, affecting or relating to real estate. (Wilson's Statutes, sec. 878.)

Section 785. Attorney in fact may convey.

[3]. Any instrument affecting real estate may be made by an attorney in fact, duly appointed and empowered as hereinafter provided. (Wilson's Statutes, Sec. 879.)

Section 786. Conveyance must be in writing.

[4]. No deed or mortgage, contract or agreement relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the parties thereto; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing, and duly subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided.

Section 4 above was repealed on the 8th day of March, 1901, by substitution of the following therefor. (Session Laws 1901, page 78.)

Section 787. Conveyance must be in writing, and if homestead signed by both husband and wife.

[4]. "No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided." (Wilson's Statutes, Sec. 880.)

Section 788. Curative provisions.

[5]. (Act of 1901). "All deeds, mortgages and contracts relating to real estate or any interest therein executed since the taking effect of the said Chapter 8, of the Session Laws of Oklahoma, 1897, executed in accordance with the provisions of this Act are hereby declared to be legal and valid." (Wilson's Statutes, Sec. 881.)

Section 789. When husband or wife alone may execute.

[6]. Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or from any cause takes up her residence out of the

Territory, he may convey, mortgage, or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the wife and the husband voluntarily abandons her, or from any cause takes up his residence out of the Territory for a period of one year, she may convey, mortgage or make any contract relating thereto without being joined therein by him. (Wilson's Stat., Sec. 882.)

Section 790. Conveyance executed by one spouse only—how avoided.

[7]. If the husband shall make any deed, mortgage or contract relating to the homestead without being joined therein by his wife he shall be concluded thereby, and the same can only be avoided by the wife; and if the wife shall make any deed, mortgage or contract relating to the homestead without being joined therein by the husband, she shall be concluded thereby and the same can only be avoided by the husband; and in either case, the husband or wife entitled to avoid any such deed, mortgage or contract shall be concluded by a failure after due notice of any suit in a court of competent jurisdiction, to set forth his or her right, title or interest therein. (Wilson's Statutes, Sec. 883.)

Section 791. Knowingly receiving benefits estoppel to deny validity.

[8]. Any person or corporation, having knowingly received and accepted the benefits, or any part thereof, of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves. (Wilson's Statutes, Sec. 884.)

Section 792. Officers' deeds must be recorded.

[9]. Deeds executed by any sheriff or other officer for real estate sold under execution, order of sale, or pursuant to any order or decree of court, shall be executed, acknowledged and recorded in the manner and with like effect as other deeds. (Wilson's Statutes, Sec. 885.)

Section 793. Husband or wife may convey separate property.

[10] The husband and wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract. (Wilson's Statutes, Sec. 886.)

Section 794. "Land," "Real Estate," and "Premises" defined.

[11]. The words "land," "real estate" and "premises" when used herein or in any instrument relating to real property are synonyms and shall be deemed to mean the same thing, and unless otherwise qualified, to include lands, tenements, and hereditaments; and the word "appurtenances," unless otherwise qualified shall mean all improvements and every right of whatever character pertaining to the premises described. (Wilson's Statutes, Sec. 887.)

Section 795. Valid against third persons only when recorded.

[12]. Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; except, actual notice to such third persons shall be equivalent to due acknowledgment and recording. (Wilson's Statutes, Sec. 888.)

Section 796. Conveyance subject to defeasance a mortgage.

[13]. Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such. (Wilson's Statutes, Sec. 889.)

Section 797. Defeasance in separate instrument.

[14]. Every instrument explanatory of any deed or other writing purporting to be a conveyance, but intended to be defeasible or as security for the payment of money, shall be deemed a part thereof, and must be filed and recorded therewith; and unless such instruments are so filed and recorded together, they and each of them shall have no other effect than

an unrecorded mortgage, and the recording of the principle (principal) instrument shall secure no rights to the holder thereof. (Wilson's Statutes, Sec. 890.) N. B.—See Section 717.

Section 798. Innocent purchasers protected.

[15]. Any person purchasing or taking any security against real estate in good faith and without notice from one holding under an instrument purporting to be a conveyance, but intended as security for the payment of money, and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price paid or actual outlay occasioned, with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay. (Wilson's Statutes, Sec. 891.)

Section 799. Conveyance—when an assignment.

[16]. Any conveyance, other than as above provided, by one holding under an instrument purporting to be a conveyance, but intended as security, shall be deemed and treated as an assignment and transfer of the mortgage rights of and indebtedness due the maker thereof. (Wilson's Statutes, Sec. 892.)

Section 800. Mortgagee benefits accruing to.

[17]. All rights of a mortgagor or grantor in and to the premises described in the instrument and existing at the time or subsequently accruing, shall accrue to the benefit of the mortgagee or grantee, and be covered by his mortgage or conveyed by his deed, as the case may be. (Wilson's Statutes, Sec. 893.)

Section 801. Quitclaim deed conveys what interest.

[18]. A quitclaim deed, made in substantial compliance with the provisions of this act, shall convey all the right, title and interest of the maker thereof in and to the premises therein described. (Wilson's Statutes, Sec. 894).

Section 802. Warranty deed—what interest conveyed by.

[19]. A warranty deed, made in substantial compliance with the provisions of this act, shall convey to the grantee, his heirs or assigns, the whole interest of the grantor in the premises described, and shall be deemed a covenant on the

part of the grantor, that at the time of making the deed he is legally seized of the indefeasible estate in fee simple of the premises and has good right and full power to convey the same; that the same are clear of all incumbrances and liens, and that he warrants (to) the grantee, his heirs and assigns, the quiet and peaceable possession thereof, and will defend the title thereto against all persons who may lawfully claim the same, and the covenants and warranty shall be obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed. (Wilson's Statutes, Sec. 895.)

Section 803. Power of attorney to convey land.

[20]. A power of attorney in fact for the conveyance of real estate or any interest therein, or for the execution or release of any mortgage therefor, shall be executed, acknowledged and recorded in the manner required by this act for the execution, acknowledgment and recording of deeds and mortgages, and shall be recorded in the county where the land is situated, and no deed, mortgage or release of mortgage, executed by an attorney in fact, shall be received for record or recorded until the power under which the same is executed has been duly filed for record in the same office; and the recording of any deed, mortgage, or release of mortgage shall be of no effect for any purpose until the power under which it is executed has been duly filed for record in the same office. (Wilson's Statutes, Sec. 896.)

Section 804. Judgment—when not effective against previous grantors.

[21]. In all cases where there is a recovery of land or any interest therein, adverse to any warranty deed thereto, the judgment by which such recovery is had shall not be effective, or become the basis of any action, against previous grantors other than those who are parties thereto, or have been notified in writing of the pendency thereof twenty days before such judgment is entered. (Wilson's Statutes, Sec. 897.)

Section 805. Warrantee—how recovers on warranty.

[22]. In all cases where an action is brought against a grantee, to recover real estate conveyed to him, by warranty deed, he must notify the grantor, or persons bound by the warranty, that such suit has been brought, at least twenty days

before the day of trial, which notice shall be in writing and shall request such grantor or other persons to defend against such action; and in case of failure to give such notice there shall be no further liability upon such warranty, except when it is clearly shown that it was impossible to make service of such notice. (Wilson's Statutes, Sec. 898.)

Section 806. Warrantee—when may recover on warranty.

[23]. Where any grantor applies in any action to defend his warranty or fails to appear after due notice the court shall determine all the rights of all the parties and in case the recovery is adverse to the warranty the warrantee shall recover of the warrantor the price of the land paid for the conveyance at the time of the warranty, the value of all improvements lost, if any, and all sums necessarily expended, including a reasonable attorney fee and interest at the rate of ten per cent per annum on all sums so paid from the time of payment. (Wilson's Statutes, Sec. 899.)

Section 807. Procedure where warrantor fails to defend.

[24]. If a warrantor, or other person bound by a warranty shall fail to appear and defend after due notice as above provided, the warrantee may defend the action and recover in a separate suit all sums expended the same as he might do in the same suit, as provided in this act. (Wilson's Statutes, Sec. 900.)

Section 808. Conveyances must be acknowledged.

[25]. No deed, mortgage or other instrument affecting real estate, shall be received for record or recorded unless executed and acknowledged in substantial compliance with this act; and the recording of any such instrument not so executed and acknowledged shall not be effective for any purpose. (Wilson's Statutes, Sec. 901.)

Section 809. When admissible as evidence.

[26]. All instruments affecting real estate and executed and acknowledged in substantial compliance herewith, shall be received in evidence in all courts without further proof of their execution; and in all cases where copies or other instruments might be lawfully used in evidence, copies of the same, duly certified from the records of the register of deeds, may be

received in evidence; and if the same need not be recorded to be valid for the purpose for which such evidence is offered, a copy duly verified by oath or affidavit of any person knowing the same to be a true copy, may be received in evidence. (Wilson's Statutes, Sec. 902.)

Section 810. Must be in writing or printed, or both.

[27]. No instrument affecting the title to real estate shall be filed for record or recorded unless plainly printed or written or partially printed and partly written in the English language. (Wilson's Statutes, Sec. 903.)

Section 811. Corporations may convey by attorney.

[28]. Corporations as well as individuals, may make, acknowledge and deliver instruments affecting real estate by an attorney in fact. (Wilson's Statutes, Sec. 904.)

Section 812. Corporations—conveyances by.

[29]. Every instrument affecting real estate or authorizing the execution of any deed, mortgage or other instrument relating thereto, executed and acknowledged by a corporation or its attorney in fact in substantial compliance with this act, shall be valid and binding upon the grantor, notwithstanding any omission or irregularity in the proceedings of such corporation or any of its officers or members, and without reference to any provision in its constitution or by-laws. (Wilson's Statutes, Sec. 905.)

Section 813. Conveyances without valuable consideration void.

[30]. Every conveyance of real estate or any interest therein and every mortgage or other instrument, in any way affecting the same, made without a fair and valuable consideration, or made in bad faith, or for the purpose of hindering, delaying or defrauding creditors, shall be void as against all persons to whom the maker is at the time indebted or under any legal liability. (Wilson's Statutes, Sec. 906.)

Section 814. Conveyance passes fee-simple title unless limited.

[31]. Every estate in land which shall be granted, conveyed or demised by deed or will, shall be deemed an estate in fee simple and of inheritance, unless limited by express words. (Wilson's Statutes, Sec. 907.)

Section 815. Will may be recorded.

[32]. Any will devising real estate or any interest therein together with a copy of the probate thereof, duly certified by the probate judge, may be filed and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged. (Wilson's Statutes, Sec. 908).

Section 816. Judgment may be recorded.

[33]. Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged. (Wilson's Statutes, Sec. 909.)

Section 817. Collecting agents may release liens.

[34]. Any agent or attorney duly authorized to collect the debt secured thereby shall have power and authority to release a mortgage, and a request made of such agent or attorney who shall have collected the debt shall bind the holder of the mortgage the same as if made to him in person, and bind him to pay a like penalty. (Wilson's Statutes, Sec. 910).

Section 818. Failure to release mortgage—penalty for.

[35]. If the holder of any mortgage on real estate shall neglect or refuse for ten days after being requested by the mortgagor, his agent or attorney, to release such mortgage, such holder of a mortgage shall forfeit and pay to the mortgagor one per centum of the principal debt per diem from and after the expiration of such ten days, to be recovered in civil action in any court having jurisdiction thereof, but such request must be in writing and describe the mortgage and premises with reasonable certainty and be accompanied by the expenses of filing and recording such release. (Wilson's Statutes, Sec. 911).

Section 819. Mortgage—how released.

[36]. A mortgage may be released by an entry on the margin of the record, stating that payment of the debt has been made, the date of entry, and being subscribed by the holder of the mortgage or his agent or attorney to whom the debt was paid; or such statement may be made in a separate instrument, duly signed and acknowledged and recorded in the

office of the register of deeds; and the mortgagor must in all cases pay the expenses of such release. (Wilson's Statutes, Sec. 912.)

Section 820. Minor may take and hold real estate.

[37]. . A minor may take and hold title to real estate and an estate of free hold or inheritance may be made to commence in the future by express provisions of the deed, and without at the same time creating any intervening estate. (Wilson's Statutes, Sec. 913.)

Section 821. Forms of acknowledgment.

[38]. An acknowledgment by individuals of any instrument affecting real estate must be substantially in the following form, to-wit:

Territory (State) of Oklahoma, }
 _____ County. } ss.

Before me _____ in and for said county and Territory [State] on this _____ day of _____ 189— personally appeared _____ and _____ to me known to be the identical person— who executed the within and foregoing instrument, and acknowledged to me that _____ executed same as _____ free and voluntary act and deed for the uses and purposes therein set forth.

(Wilson's Statutes, Sec. 914).

Section 822. Acknowledgment—by whom taken.

[39]. Every acknowledgment, except when taken by a justice of the peace, must be under the seal of the officer taking the same, and when taken in the Territory may be taken before a justice of the peace of the county where the land is situated, or before any notary public, county clerk or clerk of the district court; and where taken out of the Territory, it may be taken before any notary public, clerk of a court of record, or commissioner of deeds, duly appointed by the Governor of the Territory, for the county, State or Territory where the same is taken; and when taken in any foreign country, it may be taken before any court of record or clerk of such court, or before any Consul of the United States. (Wilson's Statutes, Sec. 915.)

Section 823. Mortgage—form of.

[40]. A mortgage upon real estate may be substantially in the following form, to-wit:

Know all men by these Presents:

That, _____ and _____ of _____ County, in the _____ of _____ part _____ of the first part, have mortgaged and hereby mortgage to _____ of _____ County _____ of _____ part _____ the second part, the following described real estate and premises, situated in _____ County, Territory of Oklahoma, to-wit: _____ with all the improvements thereon and appurtenances thereunto belonging, and warrant the title to the same _____ This mortgage is given to secure the principal sum of _____ dollars, with interest thereon at the rate of _____ per centum per annum, payable _____ annually from _____ according to the terms of _____ certain promissory note _____ described as follows to-wit: _____

Dated this _____ day of _____ 189 _____

(Wilson's Statutes, Sec. 916).

Section 824. Mortgage—waiving appraisement.

[41]. Every instrument substantially the same as the above shall be deemed a good and valid mortgage, with all contracts and covenants essential to protect the rights of the holder thereof; but any further lawful contract embodied therein shall be binding upon the parties thereto, and when the words, "and waive the appraisement" are written or printed therein, the premises mortgaged must be sold without appraisement, in case of foreclosure and sale thereunder, and in such case no order for such sale shall issue for six months after the date of judgment. (Wilson's Statutes, Sec. 917).

Section 825. Warranty deed—form of.

[42]. A warranty deed to real estate may be substantially in the following form, to-wit:

Know all men by these Presents:

That _____ part _____ of the first part, in consideration of the sum of _____ Dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto _____ the following described real property and premises, situate in _____ County, Territory of Oklahoma, to-wit: _____ together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said part _____ of the second part, _____ heirs and assigns forever, free, clear and discharged of and from

all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature;

Signed and delivered this _____ day of _____ 189—

(Wilson's Statutes, Sec. 918).

Section 826. Quitclaim deed.

[43]. A quitclaim deed to real estate may be substantially the same as a warranty deed, with the word "quitclaim" inserted in connection with the words, "do hereby grant, bargain, sell and convey," as follows: "Do hereby quitclaim, grant, bargain, sell and convey," and by omitting the words, "and warrant the title to the same." (Wilson's Statutes, Sec. 919).

Section 827. Corporations, conveyances by—how executed.

[44]. Every deed or other instrument affecting real estate, made by a corporation, must have the name of such corporation subscribed thereto either by an attorney in fact or by the president or a vice-president of such corporation, and when made by a public corporation the name of such corporation must be subscribed by the chief officer thereof. (Wilson's Statutes, Sec. 920).

Section 828. Corporate seal to be attached.

[45]. Every deed, or other instrument affecting real estate, executed by a corporation, except when executed by an attorney in fact, must be attested by the secretary or clerk of such corporation with the corporate seal attached. (Wilson's Statutes, Sec. 921).

Section 829. Acknowledgment by corporation—form of.

[46]. Every deed or other instrument affecting real estate, executed by a corporation, must be acknowledged by the officer or person subscribing the name of the corporation thereto, which acknowledgment must be substantially in the following form, to-wit:

Territory of Oklahoma. }
 _____ County } ss.

Before me, a _____ in and for said county and Territory (State, on this _____ day of _____ 189— personally appeared _____, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its (attorney in fact, president, vice president, or mayor, as the case may be) and

acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth (Wilson's Statutes, Sec. 922).

Section 830. Instruments previously executed.

[47]. Article one, of chapter twenty-one, entitled, "Conveyances," and chapter eighty-two, entitled, "Transfers," of the statutes of 1893, and all other acts and parts of acts in conflict herewith, are hereby repealed: *Provided*, that the passage of this act shall not affect any mortgage, deed, lease, or other instrument of conveyance executed or made prior to its passage and approval. (Wilson's Statutes, Sec. 923).

Section 831. Effective when.

[48]. This act shall be in force from and after May 1, 1897. (Wilson's Statutes, Sec. 923).

Approved March 12, 1897.

CHAPTER LXXII.

REGULATIONS OF JUNE 20, 1908, GOVERNING REMOVAL OF RESTRICTIONS IN THE FIVE CIVILIZED TRIBES.

Prescribed by the Secretary of the Interior Under the Act of Congress Approved May 27, 1908 (Public No. 140)

REMOVAL OF RESTRICTIONS.

(Sections 1 and 9 of the Act of Congress approved May 27, 1908.)

Section 832. Rules and regulations for removal of restrictions under Act of May 27, 1908.

[1]. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads of said allottees enrolled, as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning

rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eight, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

[8]. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

[19]. Adult members of the Five Civilized Tribes whose allotments can not be sold or encumbered except after removal of restrictions therefrom by the Secretary of the Interior as provided by the above quoted provisions of law, and who desire to have the restrictions removed from all or part of such allotments, shall apply to the United States Indian Agent, Union Agency, through the District Agent of the

district in which the applicant resides; the application to be made in duplicate on forms which have been prescribed and will be furnished free of charge on application to the United States Indian Agent or any District Agent.

[20]. The classes of restricted land to which the above quoted provisions of laws and these regulations apply are as follows:

Homesteads of adult mixed-blood allottees having half or more than half and less than three-quarters Indian blood.

All allotted lands of adult mixed bloods of three-quarters or more Indian blood.

All allotted lands of adult full-blood allottees.

[21]. When an application is received by a District Agent he shall, after investigation, including a personal interview with the applicant, forward the application with report and recommendation to the Indian Agent at Union Agency to be transmitted with his report and recommendation for such action as the Secretary of the Interior may deem proper.

[22]. If the Secretary of the Interior finds that any applicant for the removal of restrictions should have the unrestricted control of his allotment he will remove the restrictions wholly or in part without conditions concerning terms of sale and disposal of the proceeds.

[23]. When, however, the Secretary of the Interior finds it to be for the best interests of any applicant that all or part of his restricted lands should be sold with conditions concerning terms of sale and disposal of the proceeds, he may remove the restrictions to become effective only and simultaneously with the execution of the deed by said applicant to the purchaser. Before said deed is executed the designated tract or tracts of land shall be sold upon such terms as the Secretary of the Interior may in each case specifically direct. Whenever the Secretary of the Interior so directs the Indian Agent will cause a description of the land with necessary information, to be posted at his office, and so far as practicable on the bulletin board at the Court House of each county within the territory occupied by the Five Civilized Tribes, and also at the office of each District Agent, for a period of not less than thirty days; and

sealed bids for the purchase of any such land will be received at the office of the District Agent of the district in which the land is situate until two o'clock p. m., of the day on which the bids are to be opened, and the bids will be publicly opened immediately after that hour at the office of the District Agent. All bids shall be enclosed in a sealed envelope on which must be plainly written, "Bid for Indian Lands," and the date bids will be opened must be endorsed on the envelope. The envelope must not disclose the description of the land. Neither the Indian Agent nor any employe connected with the Indian Service will be allowed to prepare any bid or to assist in the preparation thereof. Each bid must be accompanied by a duly certified check on some solvent bank, for the use of the grantors, payable to the United States Indian Agent, Union Agency, for ten percent of the amount bid as a guaranty for the faithful compliance by the bidder with his proposition. If the bid is accepted and the successful bidder shall fail, within ten days from the receipt of notice of the acceptance of his bid, to comply with the terms thereof such certified check will be forfeited to the use of the owner or owners of the land unless within thirty days after the date of opening bids the Secretary of the Interior shall order otherwise. The right to reject any or all bids is reserved.

[24]. Each tract of land posted or offered for sale, as provided herein, shall, prior to the date bids are to be opened, be personally inspected and appraised at its full value by the Indian Agent at Union Agency, or such officer or employe as he may designate, and a certificate of such appraisement by the officer or employe making the appraisement shall be sealed and not opened until immediately after the bids received for that particular tract of land are opened. The appraisement shall not be disclosed to any person prior to the opening of bids nor be made public thereafter, and no bid less than the appraised value shall be considered. All cost of conveyancing and recording shall be at the expense of the purchaser. The checks of unsuccessful bidders shall be returned at the earliest possible moment when properly receipted for to the Indian Agent.

[25]. Upon the proper consummation of a sale made in compliance with the directions of the Secretary of the Interior, the Indian Agent, or other officer in charge of the Union Agency, will make an endorsement upon the order for the

removal of restrictions from the land sold, using the following form:

I hereby certify that, pursuant to the above order, the land described therein has been sold in compliance with the directions of the Secretary of the Interior, and that, to make the sale effective, deed for said land from said allottee to _____ the purchaser, was executed on _____, 190—

[26]. The Indian Agent, or other officer in charge of the Union Agency, will make an endorsement upon the deed also, using the following form:

I hereby certify that the land conveyed by this deed has been sold in compliance with the directions of the Secretary of the Interior pursuant to the order dated....., 190.., for the removal of restrictions from said land.

[27]. Such deed and the order for the removal of restrictions, thus endorsed shall, after proper record thereof has been made at the Union Agency, be delivered by the Indian Agent to the grantee.

[28]. The proceeds of such sales shall be held by said Indian Agent in his official capacity, and be disbursed for the benefit of the respective Indians as the Secretary of the Interior may direct in each case.

[29]. When the Secretary of the Interior deems it to be to the best interest of the allottee he will, as far as practicable direct that the payment for the land sold shall be part cash and the balance secured by a first mortgage on the premises conveyed, such balance to be paid upon such terms and conditions as may be designated in each case.

C. F. Larrabee,
Acting Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR,

June 20, 1908.

Approved:

JESSE E. WILSON,
Assistant Secretary.

ORDER FOR THE REMOVAL OF RESTRICTIONS.
DEPARTMENT OF THE INTERIOR.

Washington, D. C.,.....190 .
NUMBER.....
ROLL NO.....

WHEREAS, an allottee of the
Nation, has made application for the removal of restrictions
from the following described land, to-wit:
.....
.....
.....

NOW, THEREFORE, I, under the authority vested in me
by the Act of Congress approved May 27, 1908, (Public No.
140,) and the regulations prescribed thereunder, hereby re-
move the restrictions from said above described land without
conditions concerning terms of sale and disposal of the pro-
ceeds; and said removal of restrictions to be effective thirty
days from date hereof.
.....
Secretary of the Interior.

ORDER FOR THE REMOVAL OF RESTRICTIONS.
DEPARTMENT OF THE INTERIOR.

Washington, D. C.,.... ..190..
NUMBER.....
ROLL NO.....

WHEREAS, an allottee of the
Nation, has made application for the removal of restrictions
from the following described land, to-wit:
.....
.....
.....

NOW, THEREFORE, I, under the authority vested in
me by the Act of Congress approved May 27, 1908, (Public
No. 140,) and the regulations prescribed thereunder, hereby
remove the restrictions from said above described land,
such removal of restrictions to become effective only and sim-
ultaneously with the execution of deed by said allottee to the
purchaser after said land has been sold in compliance with
the directions of the Secretary of the Interior.
.....
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE,
UNION AGENCY.

Muskogee, Oklahoma.190

I hereby certify that, pursuant to the above order, the land
described therein has been sold in compliance with the
directions of the Secretary of the Interior, and that to make
the sale effective deed for said land from said allottee to
....., the purchaser, was executed
on, 190..

.....
United States Indian Agent, Union Agency.

This application must be made in duplicate and be presented to
the District Agent of the district in which the applicant
resides.

APPLICATION FOR REMOVAL OF RESTRICTIONS.

To the Secretary of the Interior

(Through the U. S. Indian Agent, Union Agency.)

I hereby make application for the removal of restrictions
under the Act of Congress approved May 27, 1908, (Public No.
140), on the following described land, to-wit:

County in which land is located.....

Name.....

Postoffice address

Sex Age Roll No.

Citizen of Nation, Blood.....

I hereby certify that the following application is correct and
that I make the same of my own free will and accord.

Witness:

.....
Applicant's Signature.

.....
If the Secretary of the Interior shall remove the restrictions
from all or part of the above described land, I hereby agree in
consideration of such removal to abide by the orders of the Secre-
tary of the Interior, concerning the sale of the land and the dis-
posal of the proceeds for my benefit.

.....
State of Oklahoma, }
.....County. } ss.

Before me, a Notary Public, in and for said County and
State, on this.....day of.....190.., personally
appeared.....to me known to be the identical person
who executed the within and foregoing instrument, and ack-

nowledged to me that.....executed the same as.....free
and voluntary act and deed for the uses and purposes therein set
forth.

.....

Notary Public.

My commission expires this.....day of.....190.....

CHAPTER LXXIII.

GENERAL ALLOTMENT ACT OF 1887.

Chap 119.

AN ACT to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. (24 Stat., 388. 1st Kapp. 33.)

Section 833. Repeal by substitution.

[1]. This section was repealed by substitution of Section 1 of Act of February 28, 1891, 26 Stat., 794, Kapp. Laws and Treaties, Vol. 1, Page 56.

Section 834. Allotments—by whom selected.

[2]. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection.

Section 835. Allotments—preference right in selection.

[2]. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act.

Section 836. Allotments—selection—by whom made.

[2]. *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Section 837. Allotments—by whom made.

[3]. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

Section 838. Allotments may be selected out of public land.

[4]. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided.

. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Section 839. Trust patent issue to allottees.

[5]. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the

Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

Section 840. Restrictions upon alienation.

[5]. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:

Section 841. Descent and partition.

[5]. *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act:

Section 842. Secretary authorized to purchase reservations.

[5]. And *provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress:

Section 843. Lands ceded to be held for settlement.

[5]. *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education:

Section 844. Patents to settlers.

[5]. And *Provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void.

And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

Section 845. Allotment to Religious Society.

[5]. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Section 846. Allottees subject to laws of State or Territory.

[6]. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

Section 847. Allottees become citizens of the United States.

[6]. And every Indian born within the Territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life [and every Indian in Indian Territory], is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Section 848. Irrigated land.

[7] That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

Section 849. Certain tribes excepted from provisions of Act.

[8]. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choc-taws, Chickasaws, Seminoles and Osages, Miamies, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

Section 850. Appropriation for survey.

[9]. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

Section 851. Eminent domain—right to grant reserved.

[10]. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

Section 852. Southern Utes—removal of.

[11]. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe. (Approved February 8, 1887).

CHAPTER LXXIV.

AMENDMENT TO GENERAL ALLOTMENT ACT.

AN ACT to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes." (Kapp. Laws and Treaties, Vol. 1, p. 56. 26 Stat. 794.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, be, and the same is hereby, amended so as to read as follows:

Section 853. President may direct allotments.

[1]. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty, stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided, the President, in making allotments upon such reservation, shall

allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided:

Section 854. General Allotment Act to control where applicable.

[1]. *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And Provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities."

Section 855. Equalization of allotments.

[2]. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.

Section 856. Leases.

[3]. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty, cannot personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: *Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming and agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent

in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

Section 857. Allotment on public land subject to General Allotment Act.

[4]. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Section 858. Descent—how determined.

[5]. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child; *Provided*, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet:" And *provided further*, That no allotment of lands shall be made or annuities of money paid to any of the Sac and Fox of the

Missouri Indians who were not enrolled as members of said tribe on January first, eighteen hundred and ninety; but this shall not be held to impair or otherwise affect the rights or equities of any person whose claim to membership in said tribe is now pending and being investigated.

Approved, February 28, 1891.

CHAPTER LXXV.

AMENDMENTS TO ALLOTMENT ACTS.

Chap. 2348.—AN ACT to amend Section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes."

Section 859. Allottee not to become citizen until expiration of trust period.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the Laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"Section 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee-simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner

impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And, *provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Approved May 8, 1906. (34 Stat. 182.)

Section 860. Allotments exempted from debts contracted before final patent.

"That the Act entitled 'An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' approved February 8, 1887, be, and is hereby, amended by adding the following:

No land acquired under the provisions of this Act shall in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.

That no money accruing for any lease or sale of lands held in trust by the United States for any Indian, shall become

liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior. (Act June 21, 1906, 34 Stat., 327.)

CHAPTER LXXVI.

ALIENATION OF INHERITED LANDS.

Section 861. Alienation of inherited lands permitted.

[7]. That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all lands so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children. (32 Stat., 275).

Section 862. Restrictions upon alienation—continued.

“That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best; *Provided*, however, that this shall not apply to lands in the Indian Territory.” (Act June 21, 1906;—34 Stat., 326).

Section 863. Suits to establish rights to allotments authorized.

“That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence

and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency; *Provided*, that the right of appeal shall be allowed to either party as in other cases." (Act February 6, 1901;—31 Stat., 760.)

Section 864. United States attorneys may represent Indians in suits for possession of lands.

"In all States and Territories where there are reservations or allotted Indians, the United States District Attorney shall represent them in all suits at law and in equity." (Act March 3, 1893;—27 Stat., 631).

CHAPTER LXXVII.

MARRIAGES BETWEEN WHITE MEN AND INDIAN WOMEN.

Chap. 818.—AN ACT in relation to marriage between white men and Indian women. (Aug. 9, 1888, 25 Stat., 392, Kapp. Laws and Treaties, Vol. 1, page 38, 25 Stat. 392.)

Section 865. White man acquires no rights by marriage with Indian woman.

Be it enacted, etc., That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its Territories except the Five Civilized Tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

Section 866. Indian woman marrying white man become citizen of the United States.

[2]. That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizens, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

Section 867. Marriage between whites and Indians—how proven.

[3]. That whenever the marriage of any white man with any Indian woman, a member of any such tribe of Indians, is required or offered to be proved in any judicial proceeding, evidence of the admission of such fact by the party against whom the proceedings is had, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent. (August 9, 1888).

PART III.

CHAPTER LXXVIII.

FORMS OF ALLOTMENT CERTIFICATES AND PATENTS OR DEEDS ISSUED TO ALLOTTEES OF THE CHOCTAW, CHICKASAW, CHEROKEE, CREEK and SEMINOLE TRIBES OF INDIANS.

The effect of the various certificates of allotment and deeds or patents issued to allottees of the Five Civilized Tribes and Freedmen, renders it desirable for the person who gives careful consideration to when the title passes, to consider the form and effect of these various certificates, deeds as conveyances. In order that all may have an opportunity to do so, it is deemed advisable to reproduce these forms and this will be done in the order in which the various tribes have been considered in Part One.

Section 868. Choctaw and Chickasaw Homestead Certificate.

The first, therefore, in this order is the Homestead Certificate, issued to cover that part of the lands selected by a member of the Choctaw or Chickasaw Tribes designated as his homestead and is as follows:

[illegible]

Section 889. Choctaw and Chickasaw Allotment Certificate.

The next is the allotment certificate issued to the members of the Choctaw and Chickasaw Tribes and refers to the lands selected exclusive of or in excess of the homestead. This certificate is as follows:

ALLOTMENT CERTIFICATE.
DEPARTMENT OF THE INTERIOR.
In the matter of the allotment of the lands of the CHOCTAWS and CHICKASAWS.

Certificate
 No. _____
 Choctaw Land Office

158
 Roll. _____
 No. _____
 37

Citizens by Blood and Intermarriage.

This Certifies that _____ has this day
 been allotted the following described land exclusive of a homestead,
 viz.:

SUBDIVISION	SEC.	TOWN	RANGE	ACRES	100

of the Indian base and meridian, containing _____ acres
 more or less, as the case may be, according to the United States
 survey thereof.

CHOCTAW NATION.

This certificate is not transferable. Total appraised value of the land described in this certificate:

Section 870. Choctaw and Chickasaw Homestead Patent.

Pursuant to the homestead certificate a patent or deed is issued entitled "Homestead Patent," form of which is as follows:

(184A)

Homestead Patent. Roll No.
No. Date of Certificate

THE CHOCTAW AND CHICKASAW NATIONS.

(Formerly Indian Territory.)

OKLAHOMA.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

WHEREAS, It was provided by said Act of Congress that each member of said tribes shall at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of, a citizen of the Nation, as a homestead:

NOW THEREFORE, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said..... all right, title and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing
.....
acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641), pertaining to allotted homesteads.

IN WITNESS WHEREOF, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the Great Seal of our respective Nations to be affixed at the dates hereinafter shown.

Date , 190....

.....
Principal Chief of the Choctaw Nation.

Date , 190....

(Seal.)

.....
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR,

Approved , 190....

.....
Secretary.

(Seal.)

By
Clerk.

A patent or deed called an "allotment patent" is issued conveying the lands described in allotment certificate and this deed or patent is in the following form:

(185A)

Allotment Patent. **Roll No.....**

No..... **Date of Certificate**

OKLAHOMA.

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

WHEREAS, It was provided by said Act of Congress that each member of said tribes shall at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of, a citizen of the Nation, as an allotment, exclusive of land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations selected as a homestead, as aforesaid:

NOW THEREFORE, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said..... all right, title and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing

 acres, more or less, as the case may be, according to the United
 States survey thereof, subject, however, to the provisions of the
 Act of Congress approved July 1, 1902 (32 Stat., 641).

IN WITNESS WHEREOF, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the Great Seal of our respective Nations to be affixed at the dates hereinafter shown.

Date , 190....

.....
Principal Chief of the Choctaw Nation.

Date , 190....

(Seal.)

.....
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR,

Approved , 190....

.....
Secretary.

(Seal.)

By
Clerk.

Section 872. Mississippi Choctaw Homestead Designation.

There has been issued to the Mississippi Choctaws in the Choctaw and Chickasaw Nation, who have been identified but who have not established the residence required by the statute, a certificate in the following form called "Homestead Designation."

Identified Mississippi Choctaw Schedule No. _____	193 HOMESTEAD DESIGNATION.	Mississippi Choctaw Selection No. _____ Choctaw Land Office	<p style="text-align: center;">DEPARTMENT OF THE INTERIOR Commissioner to the Five Civilized Tribes. In the matter of the allotment of the lands of the CHOCTAWS and CHICKASAWS. MISSISSIPPI CHOCTAWS.</p> <p>This is to Certify that _____ duly identified by the Commission to the Five Civilized Tribes as a Mis- sissippi Choctaw Indian, has on this date designated as _____ prospective homestead of the lands of the Choctaws and Chickasaws _____ land:</p> <table border="1" style="width: 100%; border-collapse: collapse; text-align: center;"> <thead> <tr> <th style="width: 33%;">SUBDIVISION</th> <th style="width: 16%;">SEC.</th> <th style="width: 16%;">TOWN</th> <th style="width: 16%;">RANGE</th> <th style="width: 19%;">ACRES</th> <th style="width: 6%;">100</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table> <p>of the Indian base and meridian, containing _____ acres more or less as the survey thereof, the li- amounting to \$ _____</p> <p>This certificate of selection is issued to _____ as evidence of _____ possessory right to the tract of land above de- scribed for a period of three years from the date hereof or up to the time of _____ death.</p> <p style="text-align: right;">_____ Commissioner to the Five Civilized Tribes.</p>	SUBDIVISION	SEC.	TOWN	RANGE	ACRES	100																																																												
SUBDIVISION	SEC.	TOWN	RANGE	ACRES	100																																																																

CHOCTAW NATION.

This certificate is not transferable.

The person to whom this certificate is issued, or any person acting in any capacity whatever representing such person, is not authorized to cut merchantable timber from the land described herein until the person to whom this certificate is issued has been enrolled as a citizen of the Choctaw nation, and has complied with the provisions of the forty-first, forty-second and forty-third sections of the act of Congress, approved July 1, 1902 (32 Stat., 641).

There is also issued for the lands in excess of the homestead to the identified Mississippi Choctaw, an allotment designation, which is in the following form:

DEPARTMENT OF THE INTERIOR
Commissioner to the Five Civilized Tribes.
In the matter of the allotment of the lands of the
CHOCTAWS and CHICKASAWS.
MISSISSIPPI CHOCTAWS.

This is to certify that _____ duly identified by the Commission to the Five Civilized Tribes as a Mississippi Choctaw Indian, has on this date designated as _____ prospective allotment exclusive of homestead of the lands of the Choctaws and Chickasaws, the following described land:

[illegible]

of the Indian base and meridian, containing _____ acres more or less as the case may be, according to the United States survey thereof, the total appraised value of the land above described amounting to \$_____.

This certificate of selection is issued to _____ as evidence of _____ possessory right to the tract of land above described for a period of three years from the date hereof or up to the time of _____ death.

Commissioner to the Five Civilized Tribes.

**Identified Mississippi
Choctaw Schedule
No. _____**

CHOCTAW NATION.

This certificate is not transferable

The person to whom this certificate is issued, or any person acting in any capacity whatever representing such person, is not authorized to cut merchantable timber from the land described herein until the person to whom this certificate is issued has been enrolled as a citizen of the Choctaw nation, and has complied with the provisions of the forty-first, forty-second and forty-third sections of the Act of Congress, approved July 1, 1902, (32 Stats., 641).

Section 874. Mississippi Choctaw Homestead Certificate.

Upon the proof of residence required by statute of a Mississippi Choctaw a homestead certificate is issued, as to that part of the allotment selected as a homestead, showing a compliance with the statute and that certificate is as follows:

193A

Certificate

Roll of

No._____

Mississippi Choctaws,

Muskogee, Indian Territory.

No._____

HOMESTEAD CERTIFICATE.

DEPARTMENT OF THE INTERIOR.

Commissioner to the Five Civilized Tribes.

Allotment of the lands of the Choctaws and Chickasaws.

This is to certify that the enrollment of _____ as a Mississippi Choctaw has been duly approved by the Secretary of the Interior and that due proof has been made that _____ has complied with the provisions of the Act of Congress approved July 1, 1902 (32 Stats., 641), relative to residence upon the lands of the Choctaw and Chickasaw Nations, and that the following described land has been regularly allotted to _____ as a homestead:

Subdivision	Sec.	Twp.	Range	Area:		Valuation:	
				Acres.	100ths	Dollars	Cts.

of the Indian base and meridian, containing _____ acres, more or less, as the case may be, according to the United States survey thereof.

The total appraised value of the land described in this certificate amounts to \$ _____

This certificate is not transferable.

Commissioner to the Five Civilized Tribes.

Section 878. Mississippi Choctaw Homestead Patent.

The homestead patent issued to the Mississippi Choctaw who has selected an allotment in either the Choctaw or Chickasaw Nation, is as follows:

(7A)

Mississippi Choctaw

Homestead Patent No.

Mississippi Choctaw Roll No.....

Date of Certificate

THE CHOCTAW AND CHICKASAW NATIONS.
(Formerly Indian Territory.)

OKLAHOMA.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stats., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it is provided that there shall be allotted to each Mississippi Choctaw, whose name appears upon the final roll of the Mississippi Choctaws, land equal in value to 320 acres of the average allottable lands of the Choctaw and Chickasaw Nations, and that each enrolled Mississippi Choctaw shall designate, or have designated for him, from his allotment, land equal in value to 160 acres of the average allottable lands of said Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and

WHEREAS, It is further provided by said Act of Congress that upon due proof being made of a continuous bona fide residence upon the lands of the Choctaw and Chickasaw Nations of any such Mississippi Choctaw for the period therein prescribed, he shall receive a patent for his allotment and shall hold the land allotted to him subject to the limitations provided in the aforesaid Act for citizens of said Nations, and

WHEREAS,
is a Mississippi Choctaw of theblood, whose name appears upon the roll of Mississippi Choctaws approved by the Secretary of the Interior, and

WHEREAS, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of the said
.....as a homestead and that due proof has been made that the said
has complied with the provisions of the aforesaid Act of Congress relative to residence upon the lands of the Choctaw and Chickasaw Nations:

NOW THEREFORE, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the 29th section of the Act of Congress approved June 28, 1898 (30 Stats., 495), have granted and conveyed, and by these presents do grant and convey, unto the said
....., all right, title and interest of the Choctaw and Chickasaw nations, and of all other citizens of said nations, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing.....
..... acres, more or less, as the case may be,
according to the United States survey thereof, subject, however, to
all the provisions of the aforesaid Acts of Congress and to all other
laws of the United States, pertaining to the alienation and taxation
of land included in such homestead allotments, or otherwise affecting
the same and applicable to the said allottee or his heirs.

IN WITNESS WHEREOF, We, the Principal Chief of the Choc-
taw Nation and the Governor of the Chickasaw Nation,
have hereunto set our hands and caused the Great Seal of
our respective nations to be affixed at the dates hereinafter
shown.

Date , 190....

.....
Principal Chief of the Choctaw Nation.

Date , 190....

.....
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR,

Approved , 190....

.....
Secretary.

By
Clerk.

Section 879. Mississippi Choctaw Allotment Patent.

The allotment patent issued to the Mississippi Choctaw for lands in excess of a homestead or land known as the surplus allotment, is as follows:

(10A)

Mississippi Choctaw**Allotment Patent No.****Mississippi Choctaw Roll No.....****THE CHOCTAW AND CHICKASAW NATIONS.****(Formerly Indian Territory.)****OKLAHOMA.**

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stats., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it is provided that there shall be allotted to each Mississippi Choctaw, whose name appears upon the final roll of Mississippi Choctaws, land equal in value to 320 acres of the average allottable lands of the Choctaw and Chickasaw Nations, and that each enrolled Mississippi Choctaw shall designate, or have designated for him, from his allotment, land equal in value to 160 acres of the average allottable lands of said Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and

WHEREAS, It is further provided by said Act of Congress that upon due proof being made of a continuous bona fide residence upon upon the lands of the Choctaw and Chickasaw Nations of any such Mississippi Choctaw for the period therein prescribed, he shall receive a patent for his allotment and shall hold the land allotted to him subject to the limitations provided in the aforesaid Act for citizens of said Nation, and

WHEREAS,
is a Mississippi Choctaw of theblood, whose name appears upon the roll of Mississippi Choctaws approved by the Secretary of the Interior, and

WHEREAS, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of the said
..... as an allotment, exclusive of land designated as a homestead and that due proof has been made that the said
has complied with the provisions of the aforesaid Act of Congress relative to residence upon the lands of the Choctaw and Chickasaw Nations:

NOW THEREFORE, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the 29th section of the Act of Congress approved June 28, 1898 (30 Stats., 495), have granted and conveyed, and by these presents do grant and convey, unto the said
....., all right, title and interest of the Choctaw and Chickasaw nations, and of all other citizens of said nations, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing.....
..... acres, more or less, as the case may be,
according to the United States survey thereof, subject, however, to
all the provisions of the aforesaid Acts of Congress and to all other
laws of the United States, pertaining to the alienation and taxation
of land included in such allotments, or otherwise affecting the same
and applicable to the said allottee or his heirs.

IN WITNESS WHEREOF, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the Great Seal of our respective nations to be affixed at the dates hereinafter shown.

Date , 190....

.....
Principal Chief of the Choctaw Nation.

Date , 190....

.....
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR,

Approved , 190....

.....
Secretary.

By
Clerk.

The allotment certificate issued to the Freedmen of the Choctaw and Chickasaw Nation is identical and there is reproduced here the form used in the Choctaw Nation, which is as follows:

[illegible]

Section 881. Allotment Patent, Choctaw and Chickasaw Freedmen.

The allotment deed or patent issued to the Choctaw and Chickasaw Freedmen pursuant to the certificate above set out, is as follows:

(186A)

Patent to Freedman.Freedman Roll.....
No.....	Date of Certificate

THE CHOCTAW AND CHICKASAW NATIONS.

(Formerly Indian Territory.)

OKLAHOMA.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations, September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each Choctaw and Chickasaw freedman, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment; and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of freedman, as an allotment:

NOW THEREFORE, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said all right, title, and interest of the Choctaw and Chickasaw Nations and of all citizens of said Nations, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing

acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of the Act of Congress, approved July 1, 1902 (32 Stat., 641).

IN WITNESS WHEREOF, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the Great Seal of our respective Nations to be affixed at the dates hereinafter shown.

Date , 190....

.....
Principal Chief of the Choctaw Nation.

(Seal.) Date , 190....

.....
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR,

Approved , 190....

(Seal.)
Secretary.

By ,
Clerk.

Section 882. Cherokee Certificate of Homestead Allotment.

Certificate of allotment in the Cherokee Nation were issued only in two forms; one for homestead called the "Certificate of Homestead Allotment" and the other for the surplus lands, called the "Certificate of Allotment." The certificate of homestead allotment in the Cherokee Nation is as follows:

Form 31

Certificate

No.

Cherokee Roll

Freedmen Roll.

DEPARTMENT OF THE INTERIOR.
Commissioner to the Five Civilized Tribes.
CERTIFICATE OF HOMESTEAD ALLOTMENT.
CHEROKEE LAND OFFICE.

This certifies that _____
selected the following described land as a HOMESTEAD, viz.:

Subdivision of	Section	Town	Range

containing _____ acres more or less, as the case may be, ac-
cording to the United States survey thereof. Total appraised value
of land described in this certificate \$_____.

_____ Commissioner to the Five Civilized Tribes.

S. T. R. S. T. R.

S. T. R. S. T. R.

This certificate is not transferable.

Section 884. Cherokee Homestead Deed.

The homestead deed issued to allottees of the Cherokee Nation is in the following form:

(80A)

Homestead Deed.Roll, No.....

THE CHEROKEE NATION.

(Formerly Indian Territory.)

OKLAHOMA.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it was provided that there should be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Nation, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

WHEREAS, It was provided by said Act of Congress that each member of said tribe shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, as a homestead, for which separate certificate shall issue; and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of, a citizen of said tribe, as a homestead,

NOW THEREFORE, I, the undersigned, the Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing

..... acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress pertaining to allotted homesteads.

IN WITNESS WHEREOF, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this day of

....., A. D. 190.....

.....
Principal Chief of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR,

Approved, 190....

.....
Secretary.

By
Clerk.

Section 885. Cherokee Allotment Deed.

The allotment deed issued to the allottee in the Cherokee Nation conveying lands in excess of the homestead is in the following form:

(77A)
Allotment Deed.Roll, No.....

THE CHEROKEE NATION.
(Formerly Indian Territory.)
OKLAHOMA.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it was provided that there should be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

WHEREAS, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

WHEREAS, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of, a citizen of said tribe, as an allotment exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid:

NOW THEREFORE, I, the undersigned, the Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz.:

of the Indian Base and Meridian, in Oklahoma, containing
.....
acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said Act of Congress.

IN WITNESS WHEREOF, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this day of

....., A. D. 190.....

.....
Principal Chief of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR,

Approved, 190....

.....
Secretary.

By
Clerk.

Section 886. Creek Certificate of Selection.

In the Creek Nation three forms of certificates were used, being styled "Certificate of Selection," "Homestead Certificate" and "Allotment Certificate." The "Homestead Certificate" was issued for the land selected as a homestead. The "Certificate of Selection" for the land selected in excess of a homestead, and the "Allotment Certificate" was issued to the minor Indians, entitled "new-born allottees."

The "Certificate of Selection" is as follows:

Section 887. Creek Homestead Certificate.

The "Creek Homestead Certificate" is as follows:

HOMESTEAD CERTIFICATE.

CREEK NATION.

Certificate

No. _____

Department of the Interior.

Muskogee Land Office.

*This certifies that there has this day been allotted as a home-
stead, to _____ the following
described land, viz.:*

Subdivision of	Section	Town	Range

*of the Indian Base and Meridian in Creek Nation containing
_____ acres more or less, as the case may be, according to the
United States survey thereof. Total appraised value of the land
described in this certificate \$_____.*

[illegible]

Section 888. Creek Allotment Certificate.

The Creek "Allotment Certificate" issued to new-borns is as follows:

Allottee's
New Born

Roll No. _____

ALLOTMENT CERTIFICATE.

CREEK NATION.

Certificate
No. _____

Department of the Interior.
Muskogee Land Office.

This certifies that there has this day been allotted to
the following described land, viz.:

Subdivision of	Section	Town	Range

of the Indian Base and Meridian in Creek Nation containing
_____ acres more or less, as the case may be, according to the
United States survey thereof. Total appraised value of the land
described in this certificate \$_____.

This certificate is not transferable.

Section 889. Creek Allotment Deed.

Two forms of deed were used in making conveyances to the allottees of the Creek Nation; one is entitled "Allotment Deed" and is as follows:

Allotment Deed.

Roll No.

THE MUSKOGEE (CREEK) NATION.

(Formerly Indian Territory.)

OKLAHOMA.

To all to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead,

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

of the Indian Base and Meridian, in Oklahoma, containing

 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this..... day of....., A. D. 190.....

.....
Principal Chief of the Muskogee (Creek) Nation.
Department of the Interior,
Approved, 190.....

.....
Secretary.

By
Clerk.

Section 890. Creek Homestead Deed.

The other is entitled "Homestead Deed" and is as follows:

Homestead Deed.

Roll No.

THE MUSKOGEE (CREEK) NATION.

(Formerly Indian Territory)

OKLAHOMA.

To all to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of a citizen of said tribe, as a homestead,

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

of the Indian Base and Meridian, in Oklahoma, containing

..... acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the *conditions* provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee
Creek) Nation, have hereunto set my hand and caused the Great
Seal of said Nation to be affixed this..... day of.....,
A. D. 190.....

.....
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

Approved, 190.....

.....
Secretary.

By
Clerk.

Section 891. Seminole Certificate of Homestead Designation.

Four forms of certificate are used for the Seminoles. The first is entitled "Certificate of Homestead Designation" and is issued to those upon the original roll as evidence of their selection of the land therein described as a homestead. The certificate is as follows:

CERTIFICATE OF HOMESTEAD DESIGNATION.

Certificate No. _____

Department of the Interior.

Seminole Land Office.

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the allotment of the lands of the Seminoles.

This Certifies That there has this day been designated by _____ for _____ as a homestead, out of the lands heretofore selected as _____ allotment the following described lands, viz.:

[illegible]

of the Indian base and meridian.

Commission to the Five Civilized Tribes.

Chairman.

Roll No. _____

[illegible]

Section 892. Seminole Certificate of Allotment.

A certificate is issued to Seminole Allottees for the surplus lands entitled "Certificate of Allotment." This certificate is as follows:

CERTIFICATE OF ALLOTMENT.

SEMINOLE NATION.

Commission to the Five Civilized Tribes.

WEWOKA LAND OFFICE.

This certifies that

has this day been allotted the following described land, viz.:

Subdivision of	Section	Town.	Range	Acres	100th

containing—acres 1st class—acres 2nd class—acres 3rd class more or less, as the case may be, according to the United States survey thereof. Total appraised value \$

Commission to the Five Civilized Tribes.

Chairman.

203

Seminole Roll

No. _____

S.	T.	R.	S.	T.	R.
S.	T.	R.	S.	T.	R.

This certificate is not transferable.

Section 893. Seminole deceased allottee Certificate.

Another form of certificate is used for allotments in the name of the deceased member of the tribe. That form is as follows:

CERTIFICATE OF ALLOTMENT.

Indian Territory. No. Certificate

SEMINOLE NATION.
DEPARTMENT OF THE INTERIOR.
Commissioner to the Five Civilized Tribes.
SEMINOLE LAND OFFICE.

This certifies that
has this day been allotted the following described land, viz.:

Subdivision of	Section	Town.	Range	Acres	100th

containing _____ acres more or less as the case may be, according to the United States survey thereof.

Commissioner to the Five Civilized Tribes.

New Born Roll

No. _____

S.	T.	R.	S.	T.	R.
S.	T.	R.	S.	T.	R.

This certificate is not transferable.

Section 894. Seminole Newborn Certificate.

For allotments made to those members enrolled by legislation subsequent to the Seminole Agreement, the following form of certificate is used :

DEPARTMENT OF THE INTERIOR.

Commission to the Five Civilized Tribes.

SEMINOLE NATION.

Seminole Roll
No. _____

Certificate
Deceased No. _____

WEWOKA LAND OFFICE.

Wewoka, I. T. _____ 190_____
This is to certify that the following described land has been set apart as the allotment of _____ Deceased, viz.:

Subdivision of	Section	Town	Range

containing _____ acres 1st class _____ acres 2nd class and _____ acres 3rd class, more or less as the case may be according to the United States survey thereof.
Total appraised value of allotment \$_____.

Commission to the Five Civilized Tribes.

Chairman.

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

THE UNITED STATES OF AMERICA, Complainant, vs. JAMES P. ALLEN et al., Defendants.	}	No. 284 AND SIMILAR CASES.
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OPINION SUSTAINING DEMURRERS.

RALPH E. CAMPBELL, *District Judge*:

The United States as complainants have filed in this court numerous bills in each of which many individuals are made defendants. Each bill has relation to lands of one of the Five Civilized Tribes. In the first paragraph of each bill, it is alleged that pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and the laws of the United States, the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use, and enjoyment of and the title to said land, and that according to the terms of said treaties and of said acts of Congress relating thereto and of the patent to said lands, the said tribe of Indians and every member thereof have at all times been and now are without power to dispose of any part of said lands or of any interest therein without the consent and authority of the United States or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indian Tribe and the several members thereof, the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof, by virtue of which there is imposed upon the United States the duty to do whatever is necessary for the guidance, welfare, and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a

tribe of Indians by the United States, under the care of an Indian Agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe, and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the acts of Congress under which the lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the alienation thereby imposed. Paragraph IV of the bill then sets forth the character of the land involved at the date of the conveyance sought to be canceled, as to whether allotted or tribal. For convenience, the bills may be classed as follows:

CHEROKEE NATION.

- No. 1. All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908.
- No. 2. All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship.
- No. 3. Sales, without approval of Secretary, of lands inherited by full blood heirs. Before April 26, 1906.
- No. 4. Same as above, after April 26, 1906.
- No. 5. Homesteads of freedmen.
- No. 6. Conveyance by other than allottee covering land allotted at date of conveyance.
- No. 7. Conveyances by other than allottee covering lands which were tribal at date of conveyance.
- No. 8. Homesteads of Intermarried Whites.
- No. 9. Mixed bloods. Homesteads of one-half bloods and more, and surplus of three-fourths blood and more.
- No. 10. Full bloods prior to April 26, 1906.
- No. 11. Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8. In the Choctaw and Chickasaw Nations the bills may be classed as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under the Act of May 27, 1908: As to the Seminole Nation, the bills may be classified as follows:

Conveyances by freedmen after allotment and before issuance of patent.

Conveyances by full blood heirs, before issuance of patent.

Conveyances by mixed bloods before issuance of patent.

Conveyance by other than allottees.

Conveyances by adopted citizens, before issuance of patent.

Conveyances by full-bloods.

It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be canceled, but were then tribal lands and that no individual at that time nor ever has had any separate ownership thereof or right to transfer or incumber the same. In class No. 7 it is alleged that at the date of the conveyances sought to be canceled, the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

“Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney and other evidence of title or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever. And your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that behalf, and in obstruction of the execution of the laws.”

Paragraph 6 then sets forth in detail the various conveyances sought to be canceled, involving numerous separate and

distinct tracts of land in each of which conveyances, in most instances, the individual allottee or those claiming through him, appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc., and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

“And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take, as herein alleged.”

The bill then proceeds specifically as follows:

EIGHTH.

“And your orator further shows that, in addition to the instruments of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern Judicial District of Oklahoma, and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pre-

tended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time."

NINTH.

"Your orator further shows that under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the government over them and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations, and rights of the Government, as set forth in this bill, the government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation, and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession, other than those particularly mentioned and described in this bill, in order that the same may be cancelled."

TENTH.

"Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein

from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians and as *parens patriae*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against the said defendants hereinafter prayed for is precisely the same as against each.

"Forasmuch, therefore, as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your order, your orator prays. . ."

The prayer of each bill is, first, that the conveyances set forth in paragraph six shall be decreed to be void and of no effect as instruments of conveyance, and shall be cancelled, and that the title to the lands therein described be held and decreed to be in the allottees or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claim to possessions, deeds, conveyances, mortgages, powers of attorneys, contracts and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of said tribe, or unallotted lands of the said tribe; and that the defendants be required to surrender and deliver up to the court all such deeds, etc.; and that the same be cancelled, and such lands decreed to be in the tribe or members thereof to whom they have been allotted; and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claims; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills and a date was set by the court for hearing arguments thereon, and all such demurrers were presented at the same time, fully ar-

gued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as would entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet title to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action in this: That the alleged cause of action against each defendant is improperly joined with that of numerous other defendants when there is no joint interest as between the defendants or any joint occupation of the property or any reason that would authorize the joint suit alleged; because the bills are multifarious; because the bills do not disclose such a state of facts as entitled plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have taken place prior to allotment of the lands involved, it appears that such lands have since been allotted, and we have now to consider only lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the court has no jurisdiction is unsound, if the United States are properly parties plaintiff, because wherever the United States appear as parties plaintiff or petitioners, the circuit court of the United States has jurisdiction. (Constitution, Art. 3, Sec. 2, Clause 1. Act of Congress of '87-8, 25 Stat. at Large, 433.)

The question of the capacity of the United States to sue involves the question as to whether they have such an interest in the controversy as will entitle them to maintain the suits, for unless they have such interest, either by way of title in the land, or duty or obligation in relation to the allottees and the lands involved, the demurrers on this point must be sustained. In the *United States v. San Jacinto Tin Co.*, 125 U. S. 273, a suit to annul and set aside a patent, the court says:

“But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for

relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Has the government any interest, by way of ownership of or title to these allotted lands? They were originally granted by patent to the respective tribes, to be owned and held by them while their tribal relations should exist, or until they should abandon the same. The treaty with the Choctaws provided that the land should be granted to them "in fee simple to them and their descendants, to inure to them while they should exist as a nation and live on it." (Kappler, p. 311, 7 Stat., 333.) This same title was vested in the Chickasaws. (Kappler, 487, 11 Stat., 573.) By treaty with the Cherokees (7 Stat. 478), it was agreed that the lands ceded them should be conveyed to them by patent, according to the provision of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks, it was provided that the lands assigned them should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. (7 Stat. 417.) By treaty of 1866 (14 Stat. 755), the United States granted and sold to the Seminole Nation the major part if not all of the lands now allotted to them, for the sum of fifty cents per acre, a total sum of a hundred thousand dollars. This appears to have been an unconditional grant. The above land so granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands

in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it follows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands for which allotment certificates have issued, followed, in many instances, by patent, so that the equitable title at least has passed to the individual allottee. (*Wallace v. Adams*, 143 Fed. 716.)

Under the general allotment act, where the title passes direct from the Government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. (*Schrimscher v. Stockton*, 183 U. S. 290.) There is less reason why it should revert here.

It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908, relative to the removal of restrictions, is found the following provision:

“Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expense incurred in so doing to be defrayed from the money appropriated by this act.”

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February

10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, or any enrolled member of either thereof." This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction and while the committee on Indian Affairs was considering the act of May 27, 1908, the Assistant Attorney General, for the Interior Department, appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the Department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that "the Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that if it is not necessary, it could do no damage." He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said "the Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct active opposition to it. That being the history of such efforts, it is the feeling of the Department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the Department and members of the committee, relative to incorporating such jurisdictional provisions. It was conceded that without such provision, the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that if they ex-

isted, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms not purporting to confer the right, but disavowing any intention to deny the same. Therefore, it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages.

In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed. It is urged that the appropriation of money for such suits is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere.

In the recent opinion of this court, overruling the demurrers in the town lot cases, the history of these Indians was thus reviewed:

In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi River. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised,

and on May 28, 1830, an act of Congress was passed (4th Stats. at Large 411), providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provision:

"Sec. 3. And be it further enacted, that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same; Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

Referring to the above act of Congress, it was said by Mr. Justice Davis, in the *Kansas Indians*, 5 Wallace 737:

"The well-defined policy of the Government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement, etc."

The Senate Committee, whose report is quoted in *Stevens v. Cherokee Nation*, 174 U. S. 448, took occasion to say, with reference to the Five Civilized Tribes:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a

population of strangers five times in number to their own it is not the fault of the government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

"It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian Community isolated from the whites was abandoned for a time, it was abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year, 27 Stat. at Large 612-645, a committee consisting of three members was provided for to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the union which would embrace these lands. Up to this time, the policy of the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white non-citizen population in the Indian Territory greatly outnumbered the Indians, and were constantly increasing. They were not amenable to the Indian Government. The Indian governments were far from satisfactory to the Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued; it is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It

cannot be reformed; it must be abandoned and a better one substituted." (*Stephens v. Cherokee Nation*, supra, p. 451.)

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of 1896 (29 Stat. 321) Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the Dawes Commission, and, latterly, as the Commission to the Five Civilized Tribes, acting under successive congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. (*Cherokee Nation v. Journeycake*, 155 U. S. 196; *Shulthis v. MacDougal*, 162 Fed. Rep. 331.)

The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them.

Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made. In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time, and it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession, where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States? As to his personal status, a pertinent inquiry is:

Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. (*Elk v. Wilkins*, 112 U. S. 99.)

In the Act of Congress of May 2, 1890, 26 Stat. 99, establishing a United States Court in Indian Territory, it was provided that "any member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the statutes of the United States." But few Indians availed themselves of this privilege.

In the Indian Appropriation Act of March 3, 1893, 27 Stats. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 these Indians had been specifically excluded from its provisions. That act provided that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later, Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands and the allotment of the same in

severalty to the individual members, with the view to such an adjustment upon the basis of justice and equity, as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes, they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property, both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this, the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The motive of Congress was to secure ultimate statehood, of which state the Indians should be citizens. It is of course presumed that Congress in this legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in the two very important steps, looking to statehood, that of consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and, from time to time, Congress enlarged its scope, and by successive acts provided more in detail for the accomplishment of allotment and division of the lands. In 1901, its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By act of Congress of March 3, 1901, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words

"and every Indian in Indian Territory." So that the portion of the act relating to citizenship read "and every Indian born within the Territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the Act of 1887 as originally passed, read as follows:

"That the provisions of this Act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." (Kappler's Laws, Vol. 1, 35.)

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say and did say by the amendment "every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if in the other parts of the act as originally passed there are found provisions in conflict with the clear purpose and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication. But attention is called to the fact that section 6 was again amended by the act of May 8, 1906, 34 Stat. 182.

It is clear that the main purpose of this amendment was to provide that the allottee under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision, "and provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session, and only a few days before, Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma Enabling Act, which was passed shortly afterwards. It was natural, therefore, that having specially legislated for the Five Civilized Tribes, they should in amending this general allotment act, exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without any act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such intent is expressed in clear and unmistakable terms, and in my judgment, the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma Enabling Act, in the preamble of which it is described as "An act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided "that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided." And in that act it was further provided:

"That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the

limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the Enabling Act were citizens of the United States or not, its terms clearly make them electors and give them the right to participate in the formation of the state constitution and state government, if they were inhabitants of the area in the proposed state, and are members of Indian nations or tribes. In fact, several of them were members of the Constitutional Convention. The constitution framed pursuant to the Enabling Act provided that the qualified electors of the state shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, etc. Upon submission of the Constitution, as provided in the Enabling Act, the President of the United States proclaimed statehood. The members of the Five Civilized tribes participate in all State, county and municipal elections; hold State and county offices; a member of the Chickasaw nation is now a representative in Congress, and a member of the Cherokee nation is now a United States senator from Oklahoma. In *Boyd v. Thayer*, 143 U. S. 170, it is said:

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community; and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment therefore the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of citizenship. I am not unmindful of the fact that Congress by joint resolution of March 2, 1906, continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members." And that by act of Congress approved April 26, 1906, tribal existence was "continued in full force and effect

for all purposes authorized by law until otherwise provided by law."

But by various and successive acts of Congress these tribes have been shorn of their governmental functions; their courts have long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof except resolutions of adjournment, are valid without approval by the President. In *Buster v. Wright*, 135 Fed. 951, Judge Sanborn said:

"Between the years 1888 and 1901, the United States, by various acts of Congress deprived this tribe (Creeks) of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided, it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribe." It is a continuance of the tribe in mere legal effect, just as in many States corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not in my judgment a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their political status as United States citizens. (*In re Heff*, 197 U. S. 508.)

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in

their possession of the lands originally granted to the tribe? The grants of land made under the act of Congress of May 28, 1830 (4 Stat., 411), and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement. It was then the policy of the government to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The guarantees in the treaties related to tribal protection and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government recognized in *Beck v. Flourney Co.*, 65 Fed. 30, and kindred cases, known as the Flourney cases, as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegation of guardianship, and we have now to consider whether in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized as existing between the United States and the tribe and members thereof, with reference to tribal property? The theory upon which this relation of guardianship arose and was recognized for so many years is well stated in *United States v. Kagama*, 118 U. S. at page 383 et seq., as follows:

“These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the

States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It is evident the court has in mind tribal Indians, "Communities dependent upon the United States. Dependent largely for their daily food. Dependent for political rights. They owed no allegiance to the States, and received from them no protection." To this class of Indians the courts say there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such cases, and such relation was recognized as existing over the Five Civilized Tribes before allotment, and in my judgment, so exists now, with reference to tribal property. (*Choctaw Nation v. United States*, 119 U. S. 1.)

The relation of guardianship is not established by Congress expressly saying in any particular act, "the United States is hereby declared to be the guardian of the Indians," but was deduced by the courts from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration (*Cherokee Nation v. Ga.*, 5 Peters 1), and of course recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said Mr. Justice Brewer, in the *Heff* case (197 U. S. 499):

"Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of

guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true, there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Whether the relation is now terminated or materially changed by Congress, we are to determine from a consideration of recent legislation and changes wrought thereby. As the relation was not established by any express provision, neither is it necessary to its termination. These allottees are now citizens of the United States and citizens of the State of Oklahoma. (*Slaughter House Cases*, 16 Wallace, 36.) As such they have the right to make and enforce contracts; to sue; be parties; give evidence, and to inherit, purchase, lease, sell and convey property. (*Civil Rights Cases*, 109 U. S. 1.) The fact that the allottee holds land all or a part of which is inalienable for a fixed period does not affect his civil or political status. (*In re Heff*, supra.) Nor does it follow that because as a citizen he may make contracts generally with reference to his property, that he may therefore dispose of restricted lands before the expiration of the restricted period. (*Flournoy Cases*, supra.)

In Nineteenth Opinion of Attorneys General, at page 232, Mr. Garland said of the effect of the general allotment act of 1887, whereby individual allottees were given the right of occupancy of separate tracts, the title to which the Government held in trust for twenty-five years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. . . . Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States v. Dooley, 151 Fed. 697, was a recent case instituted in the United States circuit court, E. D. Washington, by the Government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other

defendants. The allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the Government, the Court says:

"The contention that the relation of guardian and ward exists between the complainant and the allottee, cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal acts and political status as an Indian. Such was the holding in the *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relation exists between the government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court, as follows:

"But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins, he is to be forever one of a special class over whom the general Government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

"The right to maintain the suit must therefore rest on other grounds than that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the government is remediless. The authority rests upon another well-defined principle. The complainant is still vested with the legal title to the land, etc."

In *Ex parte Savage*, 158 Fed. 205, Judge Pollock, of the Kansas District, said:

"Since the decision by the Supreme Court in the case *In re Heff* . . . it cannot be doubted, I think, under act of Congress of February 8, 1887, . . . when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights, guaranteed to citizens of such state."

In the act of 1887 not only were the allottees restricted from selling the lands, but the legal title thereto was reserved in the United States during the restriction period. The allottees herein involved are restricted from selling for a fixed period, but the title is not reserved. Certainly if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottee free from incumbrance, etc. The trust relation of the tribe and the unquestioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This of course would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that if such a disposition of the matter was considered it was not adopted because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893, 27 Stat. 645, contemplated the extinguishment of the tribal title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done. The restrictions upon alienation were placed upon these lands for some purpose, however. Let us see what it was. In *Beck v. Flournoy Company*, 65 Fed. 34, Judge Sanborn says:

“The motive that actuated the law maker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in the lands situated within Indian reservations that might be allotted to Indians.”

Speaking of restricted allotments, under the general act, Judge Phillips says, in *Goodrum v. Buffalo*, 162 Fed. 817:

“Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession

of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted lands is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title, nor can title be built up by adverse possession, estoppel, or any statute of limitations. (*Clark v. Akers*, 16 Kan. 166; *Shelton v. Donohoe*, 40 Kan. 346; *Schrimpscher v. Stockton*, 183 U. S. 295; *Beck v. Flourney Company*, 65 Fed. 30; *Harris v. Hardridge*, 166 Fed. 109; *Goodrum v. Buffalo*, 163 Fed. 817.)

In the Buffalo case, last cited, Judge Phillips says:

"There is but one opinion, among the courts, with the single exception of the ruling in said United States Court of the Indian Territory, as to the construction of such acts of Congress and patents made thereunder; and that is, that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments, during the period of such limitation, are abortive. This for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no rights accrue to the defendant in such case by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land which any other citizen might prosecute in relation to real property, and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument or conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips, in the Buffalo case, *supra*:

"It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any

person, can avail to divest the Indians of the title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress in addition thereto, by the mere fact of placing restrictions upon alienation of the land, intended thereby to reserve to the United States the right to sue in its own name to set aside such illegal transactions, and to recover for the allottee such restricted property?

If such right is reserved to the government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the state court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for his benefit? My attention is called to none, nor do I know of any. Suppose a final decree is rendered in this court against the government, with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief, can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of Congress to establish such an extraordinary condition as this, must appear very plainly to warrant a court in arriving at such a conclusion. In *United States v. Payne Lumber Company*, 206 U. S., at page 473, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment when Congress clothed the allottee with full citizenship, and to provide against his improvidence, vested in him title to

his inalienable land, so that no scheme nor device, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the government was not, in the nature of things, compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue. (*United States v. Auger*, 153 Fed. 671.)

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law or otherwise, which it would have been competent to make if statehood had not ensued, for it reserved that right in the Enabling Act. But we are not now concerned with what Congress may do, but what it has done. I am not unmindful of the Act of March 3, 1905, and subsequent acts relative thereto. By the act of March 3, 1905 (33 Stat., Part 1, 1060) it is provided:

“It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where in his opinion the evidence warrants it, refer the matter to the Attorney-General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered canceling the same upon such terms and conditions as equity may prescribe, and it shall be allowable, where all parties in interest consent thereto to modify any lease and to continue the same as modified; Provided, No lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General.”

The act of March 1, 1907 (34 Stat., Part 1, 1026), contains this provision:

“To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes,

as provided by the act approved March third, nineteen hundred and five, ten thousand dollars."

The act of April 30, 1908 (Indian Appropriation Act), also provided:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the act approved March third, nineteen hundred and five, ten thousand dollars."

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land except where the law specifically provided that such lease should be subject to his approval. In *Beck v. Flourney Company*, supra, Judge Thayer said:

"It is manifest that the amendment in question authorizing allotted land to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last mentioned act, therefore, is a legislative declaration that Congress did not intend by any previous statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty."

But the Secretary of the Interior is charged with the supervision of all Indian matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to.

It is noted further that the matter is to be referred to the Attorney-General for suit in the proper United States court, and in the proviso they are referred to as suits or proceedings by the Secretary of the Interior or the Attorney-General. Whatever may have been the status of the allottee in 1905, it is clear that in a suit now instituted under this provision to cancel or modify a lease, the allottee is a necessary party. *First*: because he is one of the main parties in interest and for reasons

heretofore adverted to, is necessary to a complete determination of the controversy. And, *Second*: because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908, is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney-General regarding leases. There is nothing in this legislation which, in my judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bills there is a defect of parties.

It is urged that even though the complainant may have the capacity to maintain these suits, the bills are subject to the objection or multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land.

A bill is said to be multifarious when it improperly joins distinct and independent matters and thereby confounds them, as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant. Or the demand of several matters of a distinct and independent nature against several defendants in the same bill. (Words and Phrases, Vol. 5, p. 4616.)

In *Barcus v. Gates*, 89 Fed. 783, it is said:

“Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained.”

In *Hale v. Allinson*, 188 U. S. 56, the suit of a receiver against numerous stockholders to enforce their liability, the

court approves and adopts the opinion of District Judge McPherson, in the lower court. While that discusses the question of multiplicity of suits rather than multifariousness, the opinion is very pertinent to the situation here. In the course of the opinion, it is said:

"If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. . . . But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

Suppose the court were to retain jurisdiction of these bills and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more but not all of the defendants, as defendants.

I appreciate fully the motive of the pleaders who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all the defendants were equally interested, deemed it most practical to institute one suit instead of many.

But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct causes of action, by separate and distinct plaintiffs against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrers not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment, should be sustained, and the bills dismissed.

It is so ordered.

(Signed)

RALPH E. CAMPBELL,

Judge.

Muskogee, Oklahoma,

August 6, 1909.

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SUBJECT: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

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36. [Illegible]

37. [Illegible]

38. [Illegible]

39. [Illegible]

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